

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

R. ALEXANDER ACOSTA,
Secretary of Labor,
Plaintiff

v.
CHIMES DISTRICT OF COLUMBIA,
et al.,
Defendants

Civil Docket No. RDB-15-3315

Baltimore, Maryland
December 17, 2018
4:10 PM to 6:31 PM

**THE ABOVE-ENTITLED MATTER CAME ON FOR
TELEPHONIC MOTIONS HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT**

A P P E A R A N C E S

On behalf of the Plaintiff:

Patrick M. Dalin, Esquire
Katrina Liu, Esquire

On behalf of the Defendants:

Richard I. Scharlat, Esquire
Mark D. Meredith, Esquire
Brian Cousin, Esquire
Christina S. Dumitrescu, Esquire
Marc A. Koonin, Esquire
Joseph S. Ferretti, Esquire
Robert D. Eassa, Esquire
Scott Weatherford, Esquire
Rebecca Newman Strandberg, Esquire
Donald J. Kravet, Esquire

Proceedings recorded by mechanical stenography,
transcript produced by computer.

MARTIN J. GIORDANO, RMR, CRR, FOCR

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PROCEEDINGS OF DECEMBER 17, 2018

THE COURT: Good afternoon. I'll be with you in one second.

(Pause.)

THE COURT: Good afternoon to everyone. I'm sorry to keep you all waiting for a few minutes. This is a telephone conference on the record --

MR. KOONIN: Good afternoon, Your Honor.

THE COURT: This is a telephone conference on the record here on *Acosta versus Chimes, et al.*, Civil Number RDB-15-3315. Based upon my conference call with counsel on Friday and my letter order, which is Paper 522 that was filed today, at the request of counsel for FCE, I have delayed this trial for about a week, so the bench trial will start Monday, January the 14th, with a pretrial conference Friday, January the 11th, and, with that, we have a series of motions *in limine* which have been filed, pretty exhaustive amount of material here, and I've gone through a lot of it and spent a lot of time with this, but we're just going to go step by step with respect to these motions.

If counsel will just identify themselves for the record, please.

(Pause.)

THE COURT: Counsel, just identify themselves for the record, please. First of all, on the line for the Plaintiff,

1 for the Government, Secretary of Labor?

2 **MR. DALIN:** Your Honor, this is Patrick Dalin for the
3 Secretary of Labor.

4 **THE COURT:** All right.

5 **MS. LIU:** And Katrina Liu for the Secretary.

6 **THE COURT:** All right. Good afternoon to the both of
7 you. And then for the Defendant --

8 **MS. LIU:** Good afternoon, Your Honor.

9 **MR. DALIN:** Good afternoon, Your Honor.

10 **THE COURT:** And then for the Defendant Chimes,
11 District of Columbia, Inc.?

12 **MR. SCHARLAT:** Good afternoon, Your Honor.

13 Richard Scharlat and Mark Meredith are here.

14 Brian Cousin and Christina Dumitrescu should be on
15 the phone from the car.

16 **MR. COUSIN:** Hello, Your Honor. We're here.

17 **THE COURT:** All right. Then, for the Defendant
18 Chimes International, same set of lawyers, correct?

19 **MR. SCHARLAT:** Yes, Your Honor.

20 **THE COURT:** All right. And then --

21 **MR. COUSIN:** Yes, Your Honor.

22 **THE COURT:** -- FCE Benefit Administrators, who is on
23 the line?

24 **MR. KOONIN:** Yes, Your Honor. This is Marc Koonin.
25 I'm present, as is our local counsel, Joe Ferretti.

1 **THE COURT:** Okay.

2 **MR. EASSA:** And also Rob Eassa, Your Honor.

3 **THE COURT:** All right. Good afternoon to all of you.
4 And then, Mr. Eassa, I hope you're feeling better.

5 **MR. EASSA:** Thank you, Your Honor.

6 **THE COURT:** Then we have, for the -- I think we have
7 the same group of lawyers there, and then we have, going
8 through here -- just hold on one second here.

9 (Pause.)

10 **THE COURT:** For the Defendant, Marilyn Ward?

11 **MR. WEATHERFORD:** Good afternoon, Your Honor.

12 Scott Weatherford for Marilyn Ward, and I think
13 Rebecca Strandberg, local counsel, is also present.

14 **THE COURT:** Okay. Good afternoon.

15 **MS. STRANDBERG:** Yes, Your Honor, I am.

16 **THE COURT:** All right. Have I missed anybody?

17 (No response.)

18 **THE COURT:** Okay. Good. Thank you all very much.

19 **MR. COUSIN:** Your Honor?

20 **THE COURT:** Yes.

21 **MR. COUSIN:** Your Honor, this is Mr. Cousin. I
22 believe that Kravet & Vogel, Don Kravet, is also on the line.
23 He's another counsel for Chimes. These are special counsel on
24 the experts.

25 **THE COURT:** All right. That's fine.

1 Have I missed anybody else? One, two, three.

2 Hearing none, okay, we're ready to proceed.

3 First of all, we have four motions filed by the
4 Secretary, and I'll use the phrase Secretary and the Government
5 interchangeably. The first is the Secretary of Labor's motion
6 *in limine* and memorandum in support of his motion to exclude
7 the testimony of the Employee Benefit Security Administration's
8 investigator, Siamack Gharanfoli, and to exclude evidence of
9 the Employee Benefit Security Administration.

10 I'm going to give each side about a minute to
11 summarize their positions. I have read all this material
12 exhaustively. I've gone through it. I don't need to have you
13 just restate everything you've written, because there has been
14 quite a bit of written material, but I'll give each side an
15 opportunity. This is the Secretary's motion, and then you all
16 can decide who is going to speak for the Defendants. The
17 Defendants have filed a joint opposition.

18 This is Paper Number 477 that was filed on December
19 the 5th with quite a few -- let's say we've had an exhaustive
20 amount of material filed in the last -- just literally within
21 the last two weeks.

22 So, with that, I'll be glad to hear from counsel for
23 the Secretary for about a minute or two, and then I'd be glad
24 to hear from whoever wants to take the lead for the Defense
25 response on that, and I believe that, at least initially -- I'm

1 not sure who is taking the lead on it. It would appear that
2 the response on that -- well, I can't tell. It was filed by
3 everyone. I can't tell if it was Mr. Cousin from Denton's or
4 whoever is going to take the lead, or Michael Schrier for Duane
5 Morris, but I'd be glad to hear from the Secretary --

6 **MR. KOONIN:** Your Honor?

7 **THE COURT:** I'll be glad to hear from the Secretary
8 on this, first of all.

9 **MS. LIU:** Sure, Your Honor. Katrina Liu here.

10 So Siamack Gharanfoli is an investigator for us, so
11 his only role in this was to gather information during the
12 administrative investigation, so he has no personal knowledge
13 to which he'd be able to testify in court to. He'd only be
14 reporting what others have told him, which, in this case, would
15 be inadmissible hearsay.

16 And then any other testimony that may be solicited as
17 to his opinions, his impressions, or conclusions during that
18 administrative investigation would be protected by the
19 deliberative process privilege.

20 At one point, I do want to sort of respond a little
21 bit to at least the written response from Defendants. It
22 sounds like they're challenging essentially the sufficiency of
23 the investigation. That is not relevant here. We are now
24 litigating, and so the evidence is being presented anew to the
25 Court, and what happened at the administrative stage is not

1 really something that the Court is to review. It's really to
2 review the evidence itself to determine whether the violations
3 have occurred.

4 **THE COURT:** All right. Well, thank you very much.
5 Thank you very much on that, and I'll be glad to hear from
6 Defense side on this now.

7 What one lawyer is going to speak for the Defendants
8 on this?

9 **MR. SCHARLAT:** Your Honor, this is Richard Scharlat.

10 **THE COURT:** Okay.

11 **MR. SCHARLAT:** Unless somebody stops me, I'll speak
12 for the Defendant.

13 **THE COURT:** All right. Go ahead.

14 **MR. SCHARLAT:** Thank you, Your Honor.

15 First of all, the Secretary himself, in his brief,
16 said -- lists -- and in the Draft Pretrial Order, lists
17 Mr. Gharanfoli as a witness and indicates the need arises.
18 There is no way to anticipate exactly what's going to happen at
19 trial, and to categorically bar him is very premature.

20 We've given the Court a couple of examples in our
21 papers about where his testimony or evidence that he created
22 would be relevant. We've also got -- I'm sorry?

23 **THE COURT:** I didn't say anything.

24 **MR. SCHARLAT:** I'm sorry, Your Honor?

25 **THE COURT:** No. I didn't say anything.

1 **MR. SCHARLAT:** Okay. I thought somebody said
2 something.

3 **THE COURT:** No.

4 **MR. SCHARLAT:** We gave a couple of examples with
5 regard to Mr. Huber where Mr. Huber's testimony contradicts the
6 report created by Mr. Gharanfoli. The late-submitted
7 declaration from Diane Lapin, certainly we should be able to
8 talk to Mr. Gharanfoli and question him about that report. We
9 didn't have an opportunity to depose him about it.

10 Obviously, also relevant to attorneys' fees, Your
11 Honor, this record is replete with misconduct here, and the
12 bottom line is that there are inconsistencies between what the
13 Secretary is relying on and what he's offering as a fact and
14 what's true.

15 **THE COURT:** All right. Well, thank you very much.

16 **MR. SCHARLAT:** And, to that extent, we should --

17 **THE COURT:** All right. Well, thank you very much.
18 I'm on top of this one, and I'm aware of the implications here,
19 and the Secretary's motion *in limine* in support of this motion
20 to exclude Siamack Gharanfoli, Paper Number 477, will be
21 denied. Both the Secretary and the Defendants have listed the
22 investigator as a trial witness if the need arises, and
23 essentially it's premature at this point in time for me to
24 determine if that testimony is relevant.

25 I will note that essentially the matter of this

1 motion *in limine* to exclude Gharanfoli's testimony and the
2 evidence of essentially the Employee Benefit Security
3 Administration's investigation *per se* would be premature at
4 this point in time, and I do note the interview notes and
5 testimony that have been raised by Mr. Huber with respect to
6 the summaries that have been made and specifically Gharanfoli's
7 notes of his witness interviews and the contradiction that
8 exists apparently between Mr. Huber's view and that as to what
9 Mr. Gharanfoli's notes reflect.

10 And, in light of that, the trial testimony may be
11 relevant to also the matter of attorneys' fees, and, indeed, it
12 is the position that's been taken by the Defense, as I
13 understand it, that there is a pattern of selective notes and
14 reports, and, indeed, some allegation of misrepresenting
15 certain statements made.

16 So this clearly is a question of fact that I will
17 have to address during the bench trial of this case, and, for
18 those reasons, the Secretary's motion *in limine*, Paper
19 Number 477, to exclude that testimony will be denied for the
20 reasons set forth on the record.

21 Hold on one second here, please. Wait a minute.

22 (Pause.)

23 **THE COURT:** 477 will be denied for the reasons set
24 forth on the record.

25 The next of the four motions filed by the Secretary

1 is the motion in support of his motion to exclude the testimony
2 of Defendants' putative expert, Aaron Raddock, and I'll be glad
3 to hear from the Secretary on this next. And this is Paper
4 Number 478.

5 **MR. DALIN:** Yes, Your Honor. This is Patrick Dalin
6 addressing this motion.

7 So the Secretary alleges that the Plan paid excessive
8 fees and submits an expert report to establish that claim.
9 Defendants submit the expert report of Aaron Raddock, and he
10 said the Plan's fees aren't excessive on the basis that the
11 Plan had additional costs arising from the Service Contract Act
12 compliance. The Service Contract Act compliance, however, is a
13 requirement imposed on the employer, and regulations
14 specifically state that the employer's carrying out of those
15 administrative obligations cannot be charged to the fringe
16 benefit rate or the assets of the trust.

17 Raddock testified as to a number of activities that
18 he says should be considered when assessing the costs to the
19 Plan. Among them are completing certified payrolls, which is a
20 payroll activity pursuant to the Service Contract Act; response
21 to DOL inquiries regarding Service Contract Act compliance;
22 calculating the fringe benefit dollars to be contributed to the
23 Plan, which is a requirement under the Service Contract Act.

24 **THE COURT:** What I understand, by the way, is that --
25 I understand that the Secretary's argument essentially on this

1 is that these are settlor expenses, which the Secretary
2 contends may not be paid by the Chimes Plan, correct? That's
3 basically the thrust of the Secretary's position, correct?

4 **MR. DALIN:** That's part of it. Some of them are
5 settlor functions, and some of them are purely payroll
6 functions that have nothing to do with the trust. Yes,
7 eventually the funds paid get put into the trust, but what the
8 employer has to do to make sure that he's paying -- that the
9 employer is paying the correct fringe rate, to make sure that
10 they're keeping certified payrolls, that's wage and hour stuff.
11 That is the employer's obligation.

12 Now, the employer is free to hire someone to do that
13 work. They can hire FCE to do the work if they want, but the
14 employer has to pay for that work themselves. They can't have
15 it paid out of the trust.

16 **THE COURT:** Well, are these or are these not expenses
17 relating to legal compliance and eligibility determinations?

18 (Pause.)

19 **THE COURT:** I guess my -- I'm asking the Secretary.
20 Are they not expenses relating to legal compliance?

21 **MR. DALIN:** Well, keeping certified payrolls are
22 legal compliance for the Service Contract Act, which is a wage
23 and hour requirement for the employer, for instance. So it's
24 legal compliance, but it's legal compliance that has nothing to
25 do with ERISA or the trust, and that's what we're saying here.

1 There are numerous examples of what Raddock says --

2 **THE COURT:** All right. Okay. Well, I understand.
3 It's my understanding that essentially, if I'm not mistaken
4 here -- hold on one second.

5 (Pause.)

6 **THE COURT:** Then what would be the basis of the
7 Government's expert, Andrew Naugle, with respect to his
8 testimony based upon your position as to Raddock's testimony?

9 **MR. DALIN:** So we asked Mr. Naugle to give the Plan
10 as much credit as possible, to be as conservative as possible
11 in his analysis, so he gave credit for numerous things. That
12 doesn't mean, as a matter of law, they can take credit for a
13 number of the specific charges that Aaron Raddock gives them
14 credit for.

15 And, if you look at even the supporting documents
16 that Defendants attach to their motion, they refer to their
17 Exhibit 3, the EBSA's *Guidance on Settlor versus Claim*
18 *Expenses*, includes the example where a Plan paid \$60,000 for
19 consulting fees for USERRA and SBGA compliance, and said that
20 the Plan cannot pay those expenses. Even if it's connected to
21 benefits concerning the Plan, it's only -- you know, the other
22 side of the 50 yard line, so to speak, before the money comes
23 into the Plan, those are compliance obligations of the
24 employer, which are settlor functions, which the Plan cannot
25 pay.

1 **THE COURT:** All right. Well, I understand what your
2 argument is on this, and I must tell you I'm hard pressed to
3 understand that, if your argument is correct, then there would
4 be the basis of Mr. Naugle's testimony, but I understand what
5 your position is.

6 All right. On behalf of the Defendants, who is going
7 to respond on this?

8 **MR. KOONIN:** This is Marc Koonin, Your Honor. I will
9 respond on behalf of the Defendants.

10 First of all, this is yet another example of the
11 Secretary trying to introduce a new theory at the eleventh hour
12 that's never been raised in the Complaint or in any discovery
13 responses prior to this point. So that's a problem right
14 there.

15 But --

16 **THE COURT:** You're saying that that's because --

17 **MR. KOONIN:** Your Honor --

18 **THE COURT:** You're saying -- wait a minute. Just
19 give me a minute here.

20 You're saying that because your contention is the
21 Secretary is now arguing for the first time that these expenses
22 are settlor expenses?

23 **MR. KOONIN:** Yes, Your Honor.

24 **THE COURT:** All right.

25 **MR. KOONIN:** They've never raised that theory in this

1 case at all about settlor expenses or that being excluded,
2 which, as a general principle of law, is correct, or that these
3 are settlor expenses which they are not as a matter of law, but
4 neither of those issues were raised in the Complaint, and
5 neither were raised in the discovery. And, now that we're
6 going into trial in a couple weeks, they're raised for the
7 first time. That's not proper.

8 **THE COURT:** All right.

9 **MR. KOONIN:** But --

10 **THE COURT:** I understand.

11 **MR. KOONIN:** Based upon the --

12 **THE COURT:** I understand. I'm on this one. I
13 understand. The simple fact of the matter is --

14 **MR. KOONIN:** Okay. Both --

15 **THE COURT:** I think you're ahead, so, when you're
16 ahead, let me cut you off, because I've got a lot of territory
17 to cover here.

18 (Laughter.)

19 **MR. DALIN:** Your Honor, may I address that?

20 **THE COURT:** No, you may not. We're not having
21 rebuttal on each one. I've read these. I mean, I've spent
22 hours and hours reading this stuff, so I hope you realize I'm
23 on top of it. No, you're not. Each side goes one time, and
24 that's it, okay? And this motion --

25 **MR. DALIN:** Okay. Thank you.

1 **THE COURT:** This motion -- so don't even try. No one
2 is going to get two bites at the apple on all these motions.
3 We'll be here until 8 o'clock at night.

4 The Secretary's motion on this is denied for the
5 simple fact of the matter that essentially there is an issue
6 that the Secretary is raising as to settlor expenses. I
7 understand what it is. I'm not necessarily precluding that.

8 But, in terms of trying to determine the costs and
9 computing benefits with respect to these expenses, the expenses
10 may or may not relate to legal compliance and eligibility
11 determinations in terms of that being a proper Plan expense,
12 and I would furthermore note that, to the extent that we have
13 the testimony of the Government's expert, the Secretary's
14 expert, as to Andrew Naugle, from what I can see, I don't know
15 that he's actually addressed the matter of settlor function
16 expenses, but that's okay in terms of what will be presented at
17 trial, but we're not going to grant a motion *in limine* as to
18 Raddock's report and, at the same time, have Andrew Naugle
19 opine as well.

20 To put it bluntly, if the Secretary's argument was
21 correct, then Naugle would be precluded as well. So I'm going
22 to permit both sides to testify on that, and that's fine, but,
23 for those reasons set forth on the record, the Secretary's
24 motion *in limine* in support of his motion to exclude the
25 testimony of Aaron Raddock will be denied. Paper Number 478

1 will be denied for the reasons set forth on the record here.

2 **MR. KOONIN:** Thank you, Your Honor.

3 **THE COURT:** All right. There you go. There you are.

4 Now, hold on just one second.

5 (Pause.)

6 **THE COURT:** Okay. The next motion, the third of the
7 Secretary's motions *in limine*, this filed on December the 5th,
8 essentially the Secretary is moving, motion *in limine*, to
9 exclude the declaration of Grace Dong, who was employed by FCE
10 as a financial reporting analyst since May of 2016, and I'd be
11 glad to hear from the Secretary on this.

12 **MR. DALIN:** Yes, Your Honor. It's Patrick Dalin
13 again.

14 So FCE is trying to admit two analyses performed by
15 Ms. Grace Dong. They call the analysis pertaining to the
16 charges resulting from the 2% compliance fee a Rule 1006
17 summary, and they're trying to admit the summary with the
18 declaration without live testimony. A Rule 1006 summary,
19 however, is not a record of regularly-conducted business
20 activity; it's a document prepared specifically for trial, and
21 it cannot be admitted simply with a declaration. Under the
22 rule --

23 **THE COURT:** Well, under Rule 1006, that's not quite a
24 correct summary of Rule 1006. Rule 1006 is a summary of
25 evidence that may be based upon admissible evidence. That is

1 the principle of Rule 1006. It doesn't mean that it
2 automatically dovetails --

3 **MR. DALIN:** Right.

4 **THE COURT:** It doesn't necessarily dovetail with
5 business record under Rule 803(6) with respect to business
6 records. It doesn't mean that all the documents --

7 **MR. DALIN:** Correct.

8 **THE COURT:** -- themselves have to have been admitted.
9 It means it has to be a reasonable summary --

10 **MR. DALIN:** Yes.

11 **THE COURT:** -- of evidence which would be admissible.
12 So that's a more precise definition of that --

13 **MR. DALIN:** Yes.

14 **THE COURT:** -- but go ahead.

15 **MR. DALIN:** And the foundation for the summary is
16 laden with live testimony. An example of that is a Fifth
17 Circuit case, *U.S. v. Jennings*, 724 F.2d 436. The underlying
18 documents, as you mentioned, Your Honor, have to be admissible.

19 In this case, FCE, Grace Dong hasn't provided the
20 underlying documents. The day after the Secretary filed this
21 motion, FCE e-mailed us a second spreadsheet which it contends
22 is the underlying documents, but it's just another summary.
23 They're saying one summary is the underlying evidence for
24 another summary. It's not the actual invoices that were used
25 to calculate the fees at the time. We've been trying to get a

1 hold of the contemporaneous records calculating these monies
2 for two years and haven't received any.

3 In this case, Your Honor, you're very familiar with
4 the facts, but a quick summary. David Crutcher, one of FCE's
5 attorneys, submitted a declaration in summary judgment stating
6 that he could calculate the fees that FCE charged. He
7 purported to show that they undercharged \$1.5 million. He then
8 filed a second declaration completely walking back that
9 calculation.

10 Gary Beckman testified that FCE didn't add a 2%
11 compliance, or -- I'm sorry -- he testified that they did add a
12 2% compliance fee charge. Then he submitted a declaration
13 saying that they didn't.

14 Now we have Grace Dong submitting a declaration
15 saying that they did, and she can calculate with specificity
16 the amount charged under that fee when we have an earlier
17 letter from David Crutcher stating that FCE doesn't have the
18 records necessary to recalculate fees, and he tried to pin it
19 on Ward and say that Ward has the records, and Ward denies that
20 she has the records. So FCE can't keep its story straight
21 about whether it added a 2% compliance fee or not, about
22 whether it can calculate the fees or not.

23 **THE COURT:** Doesn't that go to the weight, not the
24 admissibility? In other words, I have already -- as I
25 recall --

1 **MR. DALIN:** Yeah, but we have to be able to cross-
2 examine someone, Your Honor.

3 **THE COURT:** Well, you certainly are free to cross-
4 examine on it. As I think I've already addressed this in my
5 Order about a month ago, where I granted FCE's motion to
6 correct the record due to a mathematical calculation error, and
7 I don't see anything that you've submitted that seems to
8 indicate that there is some error in the arithmetic calculation
9 here --

10 **MR. DALIN:** Well, we point out, Your Honor -- we
11 point out, Your Honor, that there is missing variables. You
12 can't do the math. You can't follow the math at all. You can
13 have an accountant, a mathematician, and a rocket scientist try
14 to do the math based on Ms. Dong's analysis. They can't do it.
15 It's missing necessary variables.

16 **THE COURT:** All right. Well, that may be a problem
17 for the Government as well, but this goes to the weight, not
18 the admissibility. They may have a problem with it, and the
19 Secretary may have a problem with it, and, if it's too
20 speculative, neither side is going to prevail on it --

21 **MR. DALIN:** Well, Your Honor --

22 **THE COURT:** -- because I'm going to be the one that's
23 going to judge. That is a bench trial, and I'll make that
24 determination. I'll make that determination as to the
25 Defendant, and I'll make that determination as to the

1 Government, on either side.

2 **MR. DALIN:** One additional very important point, Your
3 Honor, is the David Crutcher declaration was submitted in
4 connection with the summary judgment motion. The Court can
5 accept testimony by declaration in summary judgment, but not at
6 trial. This is substantive testimony.

7 **THE COURT:** Well, I'll judge what I can take in terms
8 of testimony. This is exactly an example -- this is a bench
9 trial. I can hear the evidence, and you're free to cross-
10 examine on this.

11 Who is speaking --

12 **MR. DALIN:** We can't cross-examine Ms. Dong if she
13 doesn't come to court. She's the person who did the analysis,
14 Your Honor, and how are we to cross-examine her if she doesn't
15 come to trial?

16 **THE COURT:** Well, quite frankly, I'm not going to
17 waste time with you trying to do a math class for a day, so
18 that's -- you're probably right on that.

19 **MR. DALIN:** We need Ms. Dong to do the math class,
20 because we don't understand the calculation.

21 **THE COURT:** All right. Well, it's very simple. It's
22 very simple. Your motion is going to be denied on this as
23 well. Three of these four motions by the Secretary, I would
24 note, had very little merit at all, and I've taken a lot of
25 time going through this.

1 I don't need to hear from the Defendants on this with
2 respect to this motion. This is nothing more than nitpicking
3 over arithmetic calculations, and, so the Government
4 understands, it may not have any weight with me. The key
5 distinction on these things in a courtroom is the matter of
6 weight as opposed to admissibility, and when one finds one's
7 self arguing a great deal over the weight, they should realize
8 that they're talking about weight, not admissibility.

9 Without question, under Rule 1006, the Dong
10 declaration is an appropriate summary under Rule 1006 with
11 respect to the underlying documents upon which it is based. It
12 doesn't mean it's going to be binding upon me, but it certainly
13 is admissible as far as I'm concerned, and it clearly would be
14 covered under a residual exception under Rule 807 with respect
15 to having indicia of reliability even if there would be a
16 hearsay problem. I don't consider this to be a major problem
17 on this, and, again --

18 **MR. DALIN:** Can I ask for a clarification of the
19 ruling? So, under Rule 1006, the proponent needs to provide
20 the underlying records, so that hasn't happened in this case.
21 What's the Court's holding with regard to the underlying
22 records?

23 **MR. KOONIN:** May I address that, Your Honor?

24 **THE COURT:** Sure. Sure. Go right ahead.

25 **MR. KOONIN:** Okay. We -- this is Marc Koonin. We

1 did attach the underlying records to our opposition. The
2 Secretary keeps pulling a sleight of hand. The Secretary keeps
3 saying, "Well, you haven't given a specific --" what the
4 Secretary likes to call an invoice.

5 Well, for most of these bills, they were based on
6 contributions, and they were run as a computer program through
7 the TAS software, and so what we've produced and what we
8 attached to the opposition were records of the contributions
9 that were produced out of TAS. If you multiply those by 11.62
10 and by 13.62, you get the differential. So the fact that we
11 don't have a report that says, "Here is the differential
12 report," is not the important issue. We've shown the
13 contributions. You can run the 11.62 and the 13.62, and you
14 can calculate the difference. It's absolutely untrue that we
15 did not provide the supporting documents.

16 **THE COURT:** I'm satisfied that this qualifies as a
17 summary document, Rule 1006. I'm satisfied there is sufficient
18 documentation of it. And I'm also satisfied that it would fall
19 under 807 in terms of residual exception. And there is
20 actually no merit -- no merit whatsoever to the Secretary's
21 motion *in limine* on the matter of the summary by Grace Dong.
22 It will be denied for the reasons set forth here on the record,
23 and that is Paper Number 479 will be denied for the reasons set
24 forth on the record.

25 So I think we're at the fourth now. We're on number

1 four of the four motions of the Secretary. The fourth motion
2 of the Secretary is one that definitely has had more merit in
3 my eyes, and that is the motion *in limine* to exclude the
4 deposition testimony of Kathy -- actually, it's T-H-A-M-E-S,
5 Thames, but, consistent with how we pronounce the river, I'll
6 pronounce her Thames unless someone tells me otherwise, because
7 it must be after the river in England, so --

8 **MR. SCHARLAT:** You're correct, Your Honor. We
9 understand it Thames, yes.

10 **THE COURT:** Well, the true English pronunciation
11 would be Thames, so I'll allow it to be Americanized. It's
12 Thames. And the matter of the opinion of Mark Abernathy.

13 As I understand it, the Secretary is moving to
14 exclude deposition designations of Kathy Thames with respect to
15 an arbitration as to which the Government, the Secretary, was
16 not a party, and no notice was provided, and there was no
17 ability to examine.

18 So I'll be glad to hear from the Government on that,
19 and then I'll hear from the Defense.

20 **MR. DALIN:** That's correct, Your Honor, and we're
21 also moving to exclude the supplemental expert report --

22 **THE COURT:** Yes, I understand.

23 **MR. DALIN:** -- of Mark Abernathy, which was produced
24 last month.

25 **THE COURT:** Yes. I understand.

1 **MR. DALIN:** So these Trilogy audit reports have been
2 at issue for the entire time of litigation. We've subpoenaed
3 Trilogy in this case in discovery. We served their responses
4 and these audit reports to all Defendants in March and April of
5 2017.

6 The Secretary identified Trilogy Consulting as an
7 entity with knowledge of FCE's administrative issues in
8 discovery responses that we've provided in February 2017.

9 Fact discovery closed in January of this year,
10 January 2018. FCE had almost a full year to take a deposition
11 of someone from Trilogy Consulting with regards to these audit
12 reports. They didn't do so.

13 Instead, they waited until discovery closed in this
14 case, and then took the deposition of the auditor who did these
15 audits in another case to which we're not a party. The entire
16 deposition pertained to these audit reports that are at issue
17 in this case. And they also brought along to that deposition
18 Mark Abernathy, their expert in this case. Under
19 Rule 804(b)(1), prior testimony of an unavailable witness isn't
20 admissible if the party who they're using it against didn't
21 have the opportunity to cross-examine the witness.

22 With regards to Abernathy's supplemental report, FCE
23 argues that, you know, experts can rely on hearsay if it's the
24 type that the expert would typically rely upon in correcting a
25 report, but, first, you know, the hearsay that experts usually

1 rely upon, for instance, in this case, would be Mark Abernathy
2 going and interviewing people in the Claims Processing
3 Department of FCE and relying upon that, and everyone would
4 agree you don't have to drag all those people into court to
5 have them testifying for the underlying statements.

6 But experts don't typically go take a deposition in a
7 case while cutting out one of the parties in the case and then
8 putting that deposition testimony into an expert report. It's
9 an unfair ambush. The Secretary is deprived of the opportunity
10 of cross-examining this witness, and it's completely unfair
11 to -- it's a complete end run around the rules and the spirit
12 of the rules in discovery. FCE shouldn't be rewarded at all
13 for engaging in such conduct.

14 **THE COURT:** All right. Thank you very much,
15 Mr. Dalin.

16 With that, Michael Schrier, are you responding on
17 that on behalf of the Defendants?

18 **MR. KOONIN:** No. Mr. Koonin will respond, Your
19 Honor.

20 **THE COURT:** All right. Okay.

21 **MR. KOONIN:** All right. So, Your Honor, there is two
22 parts to this. There is the deposition, and then there is the
23 expert report, but I would like to address these in two parts.

24 **THE COURT:** Okay.

25 **MR. KOONIN:** I mean, on the first part, nobody cut

1 the Secretary out. FCE has multiple litigation going on, and,
2 in fact, the Secretary is well aware of the other litigation,
3 because the Secretary has been -- interviewed people at the
4 corporate entities for M&L and SSL, who are opponents in this
5 other arbitration, and, in fact, one of the issues in dispute
6 in the arbitration is having to recompense them for the fees of
7 complying with the Secretary's investigation and audits.

8 So there is no intent to cut the Secretary out. We
9 didn't know what we didn't know. There were over 30
10 depositions taken in the Chimes litigation, and then, when we
11 were in this other litigation, there were other depositions
12 taken. Some overlapped, and some didn't.

13 We had no idea that -- you know, we assumed that --
14 even though we didn't agree with the Trilogy report, we assumed
15 that their auditor had a background in statistical analysis and
16 training in auditing. That would be a normal assumption. We
17 found out that wasn't the case.

18 It's not like we decided to surprise the Secretary
19 with this, because we were surprised with this, okay? We had
20 no idea, and, when we found out, we disclosed it to the
21 Secretary.

22 Now, as to point two, I think it is pretty
23 uncontested that Mr. Abernathy, as the Secretary concedes,
24 could have interviewed employees who conducted audits and
25 relied on that. Why can't he rely on the sworn testimony of

1 the person who did the audits? So he could rely on an
2 interview of somebody at the company with regard to the audit
3 according to the Secretary. The one person that he cannot rely
4 on, apparently, is the sworn testimony given by the person who
5 actually conducted the audit about what her language in the
6 audit reports mean.

7 So, you know, there is two parts to this, but,
8 particularly with regard to the report itself, I don't think
9 it's contested that experts can and regularly do rely on
10 deposition testimony and on interviews. He was present for
11 this. There is no reason to exclude that report.

12 As to the testimony itself, there were parties who
13 were acting to defend Ms. Thames or Ms. Thames, as the case
14 may -- as we've decided on in this hearing, because she was
15 defended by counsel at hearing who was seeking to bolster her
16 and her reports.

17 So the Secretary wasn't there, but certainly there
18 was somebody present who was working to bolster her and to
19 defend her work on the reports. And Your Honor has read the
20 paper.

21 **THE COURT:** All right. Well, thank you. Thank you
22 very much. Thank you very much, and I have read the papers,
23 and there is merit to this motion *in limine* filed by the
24 Secretary. It's very simple.

25 In terms of the principles, clearly as has been noted

1 as to 804(b)(1), in terms of prior testimony, it's pretty
2 axiomatic that, unless a party is given an opportunity to
3 cross-examine, this type of former testimony of a witness is
4 not admissible, and the Supreme Court -- I think it's the
5 *Salerno* case, if I recall -- I've dealt with this before -- so
6 rules. It's very abundantly clear.

7 This deposition designation of Kathy Thames was taken
8 in connection with an arbitration to which the Secretary of
9 Labor was not a party, was not directly noticed, and did not
10 attend, and you could argue all you want of whether they should
11 have known about it or whatever. That's not the test under
12 Rule 801 or under Rule 804 with respect to this out-of-court
13 statement clearly being offered for the truth of the matter
14 asserted therein. And it does not meet the exceptions under
15 804(b)(1), because the party against whom it's being offered
16 did not have the exact same motive to cross-examine Thames, and
17 it's inadmissible.

18 And, accordingly, because it's inadmissible, any
19 supplemental opinion by Mr. Abernathy shall be excluded with
20 respect to his supplemental report that's dated just four weeks
21 ago, which is some nine months, as I recall, looking at the
22 deadlines here -- he's not going to be permitted to take that
23 deposition and then amend his report.

24 So, for those reasons as set forth on the record, the
25 Secretary of Labor's motion *in limine* to exclude the deposition

1 testimony of Kathy Thames and the supplemental expert report
2 and opinion of Mark Abernathy, Paper Number 480, will be
3 granted for the reasons indicated on the record.

4 Now, I believe that that deals with all of the
5 motions *in limine* filed by the Secretary of Labor. Am I
6 correct, Mr. Dalin?

7 **MR. DALIN:** That's correct.

8 **THE COURT:** Okay. All right. So then we have now --
9 I'm trying to get through some of these as we go, and we may
10 have to take a break here in a minute, a brief break, but let
11 me just keep moving here for a minute here.

12 The next motion that I have in terms of joint Defense
13 motions is -- and I want to address the joint Defense motions,
14 and then we may have to take a brief break for something I also
15 have to tend to in a minute with respect to the FCE
16 Defendants' motions, but we'll continue on.

17 With respect to the joint Defendants motions, the
18 first one here that I have reviewed essentially is the
19 Defendants' joint motion, 471, the joint Defendants' motion *in*
20 *limine* to exclude evidence of claims processing errors on plans
21 other than the Chimes Plan, and essentially the Defendants are
22 moving to exclude all testimony and evidence relating to the
23 quality of FCE's claims processing for plans other than the
24 Chimes Plan, and the Defendants argue that it's not relevant.

25 The Secretary has argued that it is relevant under

1 Rule 401 because it essentially makes the fact of a negligent
2 operation more probable.

3 So, with that, I'd be glad to hear from counsel for
4 the Defendants, and just, again, so we're clear for the court
5 reporter, if you'll just identify who is speaking, whoever next
6 starts for the Defendants.

7 **MR. KOONIN:** Yes, Your Honor. This is Marc Koonin
8 again. I'll be taking this one.

9 **THE COURT:** Okay.

10 **MR. KOONIN:** The bottom line, Your Honor, is that
11 this evidence is not supportive of whether or not it's more
12 probable that there were problems with Chimes. It's
13 uncontested that Chimes had a dedicated team, that that team
14 was the best team, and that that team was separate. Also,
15 there is evidence in the record, separate and apart from the
16 now-excluded Kathy Thames testimony, that some of the
17 measurements that were made with regard to other clients were
18 targeted as opposed to general audits. In other words, they
19 can't be extrapolated.

20 So, when you put those two things together, it's not
21 relevant. If there were problems with a different plan that
22 were being supported by a different team on a targeted audit
23 that can't be extrapolated, then it shouldn't be attributed to
24 Chimes.

25 **THE COURT:** Well, as I understand it, if I can

1 interrupt you for a minute, don't I understand that FCE -- from
2 what I reviewed of the documents and the facts here, it's
3 contended that FCE used the same trust accounting system and
4 the same technology and even the same procedures for all of its
5 clients; did it not? Isn't that what's in the record here so
6 far?

7 **MR. KOONIN:** Well, hold on, Your Honor. The trust
8 administrative system is not used at the claims processing
9 level. There are claims for releasing the -- there are
10 portions of that software that are used to release payments or
11 to process the payments of the claim, but the actual initial
12 processing, that's not done with TAS, and it's handled by a
13 team, and Chimes had a dedicated team. So it is correct to say
14 that, once the team processes a claim, that that claim is then
15 later -- the payment is processed, in part, through TAS, or was
16 at that time. That is correct.

17 But the actual issue of how long it takes to process
18 the claims and what the application is of the exclusion rules
19 to the claim, whether there are mistakes made in the paperwork
20 or the input that goes into TAS, all that's different because
21 they have their own dedicated team doing that work.

22 **THE COURT:** Well, what is the distinction between the
23 team and the matter specifically with respect to, as I
24 understand it, the same trust accounting system and the same
25 technology and the same procedures? I know you emphasized the

1 difference in terms of the team that was involved, the actual
2 people on it, but what is the difference here in terms of the
3 matter of the computerization and the processing errors that
4 are alleged here?

5 **MR. KOONIN:** Okay. That's a good question, Your
6 Honor. One of the Secretary's complaints, if you will, in this
7 case is that FCE did not use what's called auto adjudication,
8 so Your Honor might be working under the misimpression that TAS
9 is an auto-adjudication program. It's not.

10 So the team members put the data -- they pull out
11 maybe paper, and they put data into the computer. So, when you
12 have a different team that has different people doing the work
13 with different levels of quality perhaps, then, with the
14 computer, it's garbage in, garbage out.

15 We're not conceding that there was garbage, but the
16 point is, if there were entry errors on the paperwork or the
17 computer with a totally different team, that doesn't affect the
18 quality of this particular dedicated team.

19 **THE COURT:** All right. I understand what your
20 argument is. I understand what your argument is. I'm not sure
21 if you satisfactorily answered my question, but I understand
22 what the argument is.

23 I'd be glad to hear from the Government -- from the
24 Secretary on this.

25 **MR. DALIN:** Yes, Your Honor. It's Mr. Dalin.

1 So it is contested that the Chimes claims were
2 processed by a dedicated team. Some people mentioned that in
3 deposition testimony, but you can see, in FCE's own claims
4 auditing records, that there are other persons besides those
5 mentioned who processed claims on team -- who processed claims
6 on the Chimes Plan.

7 The fact of the matter is FCE had one claims
8 processing department. They all received the same training.
9 They worked according to the same protocols.

10 **THE COURT:** Okay. I understand.

11 **MR. DALIN:** They had two outside auditors --

12 **THE COURT:** I understand. Quit while you're ahead.
13 I understand. I understand. I understand.

14 The joint Defendants' motion *in limine* to exclude
15 evidence of claims processing errors on plans other than the
16 Chimes is going to be denied. This is Paper Number 471. And
17 essentially, while the Defendants have argued that reports
18 relating to FCE's work for other plans is not relevant, the
19 simple fact of the matter is that it's relevant under Rule 401.
20 It goes to the weight, not admissibility, because the matter of
21 it addressing the alleged -- FCE's alleged negligent
22 operations. And, to the extent that there is evidence of
23 third-party audits showing FCE had any systematic claims
24 processing errors or problems in terms of the same trust
25 accounting system and the same technology is relevant for this

1 Court's review.

2 I'm not making a finding one way or the other in
3 terms of the weight that's accorded to it, but it certainly is
4 relevant, and, for those reasons, Paper Number 471 filed by the
5 Defendants -- the Defendants' joint motion to exclude evidence
6 of claim processing errors, Paper Number 471, will be denied
7 for the reasons set forth on the record.

8 The next joint Defense motion that was filed on
9 December the 5th as well is the joint Defendants' motion to
10 preclude the Secretary from offering evidence relating to
11 subsequent remedial procedures, Paper Number 4 -- I'm sorry.
12 Hold one second here. Wait a minute.

13 (Pause.)

14 **THE COURT:** Paper Number 473 is the next one I want
15 to address here. And I'll be glad to hear -- essentially, I
16 don't need to hear from the Defendants on it. I'm very clear
17 on what their view is, and essentially it's seeking to have the
18 Secretary be precluded from subsequent remedial measures that
19 Chimes took after the lawsuit was filed, and the Defendants
20 have argued that should be excluded under Rule 407 if it's
21 being used to show negligence or culpable conduct. The
22 Secretary has responded that it does not intend to introduce
23 that evidence for showing negligence, but to impeach
24 Defendants' putative expert and to rebut the lack of
25 feasibility defense.

1 This is very simple. This motion will be granted,
2 and it's granted, quite simply, for the fact that, when it
3 comes to Rule 407 and remedial procedures, I do not entertain
4 any dance around it, what could have been done, whatever.

5 Rule 407 is very clear to me. It comes up in a lot
6 of cases, and I don't allow a lot of wiggle room around
7 Rule 407 when it comes to remedial measures, and I'm not going
8 to entertain any argument with respect to trying to rebut a
9 lack of feasibility defense with respect to trying to show that
10 there were feasible replacements, and, as far as I'm concerned,
11 those kind of efforts to get around Rule 407 don't go well with
12 me in any context in terms of any cases I have.

13 So it's very simple. I've read the papers on it.
14 The joint Defendants' motion *in limine* to preclude the
15 Secretary from offering evidence relating to subsequent
16 remedial measures, Paper Number 473, will be granted for the
17 reasons clearly stated in the joint Defendants' motion, and it
18 will not be permitted. So that will be granted for the reasons
19 set forth.

20 All right. The next motion I have here to address is
21 the Defendants' joint motion *in limine* to preclude evidence of
22 extraneous lawsuits or investigations. Give me one second.

23 (Pause.)

24 **THE COURT:** Yes. The next one I have here is the
25 Defendants' joint motion to preclude evidence of extraneous

1 lawsuits or investigations, which is Paper Number 475, and
2 essentially the Defendants have moved to preclude the Secretary
3 from presenting any evidence with respect to other
4 investigations or lawsuits relating to any other plan apart
5 from Chimes.

6 The Government, as far as I understand it, has agreed
7 that it will not admit evidence as to Ward, but it contends
8 that he may have evidence admitted for impeachment purposes or
9 statements by a party opponent.

10 What is the Secretary's position on this? I'm not
11 sure if I understand what the Secretary's position is on this.

12 **MR. DALIN:** So, Your Honor, they're asking for a very
13 broad order excluding any evidence of other lawsuits or
14 investigations. The Secretary agrees that this one example
15 that they provide with regards to Ward accepting an injunction
16 in another case is not something that's part of our affirmative
17 case.

18 You know, potentially, it could be relevant on
19 rebuttal, but it's not something that we're -- you know, we
20 stipulate we'll not be putting it into our affirmative case,
21 but there can be evidence that's, you know, connected to
22 another case; for instance, Raddock's testimony in another case
23 could be used for impeachment.

24 The Secretary subpoenaed documents in this case from
25 service providers. FCE services a lot of plans, and they use a

1 lot of the same service providers for those plans, so we get
2 documents that may pertain to other plans besides Chimes just
3 because that's how those service providers keep those
4 documents.

5 Whether they're relevant or not is a case-by-case
6 decision. As a blunderbuss order saying that no documents that
7 are related to any other investigation or lawsuit would
8 preclude such things as the Raddock transcript or financial
9 statements from service providers that mention the Chimes
10 Plan --

11 **THE COURT:** Well, I don't know that that's the
12 breadth -- I don't interpret that to be the breadth of the
13 Defendants' joint motion. The motion is to preclude evidence
14 of extraneous lawsuits or investigations.

15 I really don't care about other lawsuits or
16 investigations. To the extent that there is a document that
17 somehow was in another case and you wanted to challenge the
18 testimony of a witness, I don't care what context the testimony
19 is. If it's the testimony of a person, you're free to present
20 that if that testimony was under oath. I don't care if it's a
21 deposition in a divorce case. The person is under oath and
22 answers certain questions, you're free to challenge someone in
23 that regard, but, in terms of evidence of extraneous lawsuits
24 or investigations, I'm not really interested in challenging and
25 trying to attack Ward or anyone else as a fiduciary with

1 respect to those other investigations or lawsuits.

2 So essentially the motion will be granted, but it
3 doesn't mean that, if you have deposition testimony of someone
4 in another case and you want to challenge their testimony, if
5 it's impeaching, you're free to use it, but you're not free to
6 use it in the context of, well, there is another lawsuit or
7 another investigation. Quite frankly, I'm not going to be
8 tainted by that in terms of acting, you know, as the finder of
9 fact in this case and making findings of fact and rulings of
10 law. So, to that extent, Paper Number 475, the joint motion to
11 *in limine* to preclude evidence of extraneous lawsuits or
12 investigations, will be granted with that explanation for the
13 reasons set forth on the record.

14 Any questions about that from the point of view of
15 the Secretary?

16 (Pause.)

17 **THE COURT:** Hearing none, okay.

18 Any questions from the point of view of the Defense
19 on that? Hearing none, that motion --

20 **MR. KOONIN:** No, Your Honor.

21 **THE COURT:** That motion will be granted.

22 And so the next motion is the joint motion *in limine*,
23 Paper Number 476. This is the motion -- at least the way I've
24 analyzed these with my notes and what have you, this is the
25 joint motion *in limine* to exclude evidence concerning

1 reasonableness of BCG's fees and contributions, and essentially
2 the Defendants have moved for exclusion of evidence regarding
3 the reasonableness of BCG's fees and charitable contributions
4 because it is not relevant after the dismissal of the BCG
5 Defendants from this case based upon my previous ruling.

6 And, as I understand it, the Secretary has responded
7 that the reasonableness of BCG's fees is still an open question
8 and is relevant with respect to the case against Chimes D.C.,
9 essentially arguing that my opinion was focused on BCG's
10 knowledge, not on the reasonableness of the fees. I think
11 that's really the thrust of what all these motions are about.

12 So, with that, I'd be glad to hear from Defense
13 counsel on this, and then I'll give the Secretary an
14 opportunity to respond.

15 Who wants to argue this for the Defense?

16 **MR. SCHARLAT:** This is Richard Scharlat.

17 **THE COURT:** Okay.

18 **MR. SCHARLAT:** If nobody stops me, I'll do it.

19 **THE COURT:** Okay. Go ahead.

20 **MR. SCHARLAT:** And Your Honor basically summed it up
21 that any evidence about the reasonableness of BCG's fees is
22 out. It's not relevant to any remaining issue in this case.
23 And I don't have much to add to what you already --

24 **THE COURT:** Okay. That's fine. That's fine. I
25 understand what your argument is.

1 All right. Go ahead. Let me hear from the Secretary
2 on this.

3 **MS. LIU:** Your Honor, I believe the Court already
4 understands our argument. Just because BCG is no longer a
5 party here doesn't mean that its payments are irrelevant to the
6 claims that are still live.

7 **THE COURT:** Yes. That's enough from the Government,
8 because I think the Government is absolutely correct on that.
9 My ruling on BCG has to do with the BCG's knowledge, and did
10 not in any way relate to the reasonableness of the fees, and so
11 I think the Secretary is correct on this point. BCG's fees and
12 contributions are still relevant to the case to be presented
13 against the Chimes Defendants.

14 So, for that reason, the Defendants' joint motion *in*
15 *limine* to exclude evidence concerning reasonableness of BCG's
16 fees and contributions, Paper Number 476, will be denied for
17 the reasons set forth on the record.

18 So that the next motion here we have is, I think --
19 we have two more here, joint motions, and this would be Paper
20 Number 483 -- hold on one second here. Wait a minute.

21 (Pause.)

22 **THE COURT:** Wait one second here.

23 (Pause.)

24 **THE COURT:** Hold on one second here. Wait a minute.

25 No. I think we missed one here. Let's do 472.

1 Haven't done 472 yet. I had my notes here on that.

2 We have two motions left here on joint Defense
3 motions, and there is the joint Defendants' motion to preclude
4 the Secretary from offering expert opinion testimony in support
5 of claimed damages for the years 2010, 2016, and 2017. And
6 that is Paper Number 472.

7 And I'll be glad to hear from the Defendants on that,
8 and then I'll hear from the Secretary on his response.

9 **MR. MEREDITH:** Good afternoon, Your Honor. This is
10 Mark Meredith on behalf of the joint Defendants for this motion
11 *in limine*.

12 **THE COURT:** All right.

13 **MR. MEREDITH:** As the papers set forth, the motion is
14 really a very limited motion to exclude the expert testimony
15 for years 2010, '16, and '17 based on the theory that the
16 Secretary had those 5500s well before the time the expert's
17 opinion was served.

18 The Secretary appears to concede this argument in
19 their paper. They say that, to the extent that the Defendants
20 seek to exclude the Secretary's expert opinion to demonstrate
21 damages in 2010, '16, and '17, that no such exclusion is
22 necessary because the expert report only analyzes 2011 through
23 '15, which we take to be an admission and a concession that, in
24 fact, they do not dispute the relief we request.

25 However, I did want to just briefly address the

1 Secretary's additional arguments, which appear to be that, in
2 fact, even if there is not expert testimony regarding 2010,
3 '16, and '17, that they should not be excluded from introducing
4 evidence of damages of those years, and, to that, we would only
5 say we don't know how they'll get that evidence in if they're
6 not relying upon expert testimony. The cases they cite in
7 their motion *in limine* -- *Pender*, for example -- relies on an
8 expert opinion regarding profit. So our position would be that
9 their distinction between profit and damages seems to be
10 dancing on the head of a pin.

11 And then, secondarily, we would just point out that,
12 to the extent they're seeking an accounting or equitable relief
13 under 502(a)(5) with respect to BCG, that relief requires
14 knowingly participating in that violation, and the Court has
15 already ruled that BCG, based on your previous opinion, did not
16 knowingly participate in that violation. And so, to that
17 extent, the DOL's relief regarding evidence should be
18 precluded.

19 **THE COURT:** All right. Well, thank you very much,
20 Mr. Meredith.

21 And, with that, I'd be glad to hear from you,
22 Mr. Dalin, on the Government's response on that.

23 **MS. LIU:** Your Honor --

24 **THE COURT:** Oh. I'm sorry, Ms. Liu.

25 **MS. LIU:** Katrina Liu. I'm going to take that one.

1 **THE COURT:** Okay. Go ahead, Ms. Liu. I'm sorry.

2 **MS. LIU:** Sure. So, to the extent of -- Defense
3 counsel is correct. The expert -- our expert -- excuse me --
4 does not submit an opinion for 2010, 2016, 2017, but the way I
5 understood the motion was that they seek to preclude all
6 evidence of damages entirely if it is not in the form of an
7 expert opinion for which they cite no authority.

8 And so the Secretary seeks to admit what evidence he
9 has regarding damages for those years, and I think, to the
10 Court's earlier point, that is a question of weight, not
11 admissibility. And, to respond also to what I understand to be
12 the argument that, because BCG was able to defeat the
13 Secretary's claim of knowing participation, that somehow that
14 means that damages that the Plan incurred in relation of
15 payment of fees to BCG cannot -- that we cannot pursue those
16 damages. I don't quite understand the foundation for that.

17 **THE COURT:** Well, I think I understand what the basis
18 is on that, Ms. Liu, is that essentially the Defendants are
19 moving to preclude expert testimony on damages for any years
20 other than 2011 through 2015. And the Amended Complaint -- the
21 operative Amended Complaint as to which we're proceeding next
22 month at trial -- hold on one second. I'm about to sneeze.
23 Excuse me.

24 (Pause.)

25 **THE COURT:** Excuse me. I'm sorry. I had to sneeze.

1 I didn't want to have the court reporter have to put that on
2 the record. He's good, but he's not that good.

3 (Laughter.)

4 **THE COURT:** The Amended Complaint that was filed in
5 2015 alleges that 2008 through the present -- and I've already
6 made a decision on limitations precluding evidence from 2008 to
7 2009, and the Secretary's own expert report only includes
8 damages for 2011 and 2015, so that there was no basis for the
9 Secretary offering expert testimony in support of any damages
10 for any other years -- specifically, 2010, 2016, and 2017 --
11 because it's not considered by Mr. Naugle in his report, if I'm
12 pronouncing his name correctly.

13 The response that the Secretary is not required to
14 use an expert to present damages evidence, I'm afraid, without
15 getting in too deep into the legal analysis here, that's what
16 I'm going to expect with respect to supporting damages and a
17 demonstration of loss to the Plan, and that's really the
18 essential matter I have to address.

19 So this motion filed by the Defendants will be
20 granted. There is no basis for me to consider anything other
21 than the damages for the years 2011, '12, '13, '14, and '15,
22 and there will be no basis for offering expert testimony in
23 support of any claimed damages for the years 2010, 2016, and
24 2017. So, for those reasons, Paper Number 472, the joint
25 Defendants' motion, will be granted.

1 So, with that, we have one more joint motion, I
2 believe, joint Defense motion here, and that is the Defendants'
3 joint motion to preclude the Secretary from offering evidence
4 relating -- I'm sorry. Wait a minute.

5 It's Defendants' joint motion to preclude the
6 Secretary from offering evidence, including expert testimony,
7 in support of any claim that alleged excessive fees paid to FCE
8 by the Chimes Health & Welfare Plan exceeds \$2,931,000,
9 et cetera, and that, I think, is the last joint motion here if
10 I'm not mistaken. And, as to that, I think that that would
11 appear -- and you all can correct me if I'm wrong on this, and
12 I'll certainly give the Defendants the opportunity on this to
13 distinguish it, but I think this relates in many ways to my
14 previous denial of the joint motion to exclude evidence
15 concerning reasonableness of BCG's fees and contributions.

16 That was Paper Number 476, in which I denied that
17 motion, noting that the fees and contributions may be still
18 relevant as to the case against Chimes and the matter of
19 precluding evidence, including expert testimony, in support of
20 any claim of alleged excess fees because essentially the
21 Defendants have argued that the claims against BCG are now out
22 of the case, but I think the position of the Government is that
23 those claims include failing to prudently and loyally monitor
24 the Plan expenses.

25 So it seems to me that the same analysis would be

1 attendant to this particular motion, but I'll be glad to hear
2 from Defense counsel on this, and then I'll give Government
3 counsel an opportunity to respond, but it would certainly
4 appear that it relates to the same issue, that, even though BCG
5 is out of the case, it doesn't mean that expenses and/or fees
6 and contributions, et cetera, and claims and fees paid still is
7 not relevant as to the claims against Chimes, but I'll be glad
8 to hear from Defense counsel on this.

9 **MR. SCHARLAT:** Thank you, Your Honor. This is
10 Richard Scharlat.

11 I think this is actually a little different, and I
12 think, at the end of the analysis, the Secretary and Defendants
13 don't really fundamentally disagree. What we've presented --
14 what we've presented -- hello? What we've presented to the
15 Court -- and maybe somebody should mute the phone.

16 What we've presented to the Court on Page 2 of our
17 motion, in the chart, is a calculation which is taken directly
18 from Table 12 of Mr. Naugle's report. That is a very targeted
19 number. That number is the direct excessive fees that the
20 Secretary claims were paid to FCE. We calculate that number
21 based on Mr. Naugle at 2.931 million.

22 **THE COURT:** Yes. I've got that in front of me right
23 here. It's right here, and it's for the years I've mentioned,
24 2011, '12, '13, '14, and '15.

25 **MR. SCHARLAT:** Correct.

1 **THE COURT:** Okay.

2 **MR. SCHARLAT:** And I actually think it's more akin to
3 the last motion Your Honor ruled on, you'll see in a minute --

4 **THE COURT:** All right.

5 **MR. SCHARLAT:** -- and that's why we've stuck to those
6 numbers, because that's what Mr. Naugle said.

7 The Secretary, however, provides a chart in its
8 opposition, which puts apples and oranges together, which is
9 fine, except that it's sort of -- it confuses the issue.

10 If Your Honor looks at that chart that the Secretary
11 did, in the first little box next to the one that says "Year,"
12 you see the Secretary combined direct and indirect fees.
13 That's how their number got higher. They included the 2.204
14 indirect fees to get to the 5.8.

15 **THE COURT:** All right.

16 **MR. SCHARLAT:** I have not been able to figure out,
17 Your Honor, why there is a difference between 3.6, which the
18 Secretary admits is the excessive direct compensation actually
19 paid to FCE, and our 2.9, which we say is that same number.

20 **THE COURT:** All right.

21 **MR. SCHARLAT:** The point of this, Your Honor, is that
22 this is the only -- besides BCG -- and I understand Your Honor
23 saying that's still in the case. Besides BCG, this is the only
24 number for which Mr. Naugle does an expert analysis.

25 To get up to the 8.3 -- putting aside the indirect,

1 to get up to the 8.3 number that Mr. Naugle mentions on Page 24
2 of his report, in a little line under his chart, the Secretary
3 wants this Court to add up all -- and the parties to add up all
4 the vendor charges and fees in Attachment I to Mr. Naugle's
5 report without presenting any reasonableness analysis at all
6 with regard to those fees.

7 The Secretary wants this Court to hear and consider
8 evidence that a lump sum of unanalyzed payments should be held
9 against us and should be considered to potentially be
10 unreasonable. There is nothing in Mr. Naugle's report or
11 otherwise in the record to show any payments to Wachovia, to
12 Trucker & Huss, to The Arc of San Diego, whatever the amounts,
13 were unreasonable.

14 That's why we focused on FCE, Judge, because that's
15 the only -- besides BCG, that's the only analysis Mr. Naugle
16 does with regard to excessive direct fees, and our point is the
17 Secretary should be limited to that 2.9 number. We can figure
18 out the difference between the 2.9 and 3.6, but that should be
19 limited, and that's all he does analysis on.

20 **THE COURT:** All right. Thank you very much.

21 And I'll be glad to hear from the Government.

22 **MR. DALIN:** Yes, Your Honor. Chimes Defendants are
23 misrepresenting Naugle's report. So, first of all, the 8.3
24 number is Mr. Naugle's analysis of excess fees in aggregate, so
25 he looked at all Plan expenses, benchmarked it against a sample

1 of plans that he developed, and determined that the Plan paid,
2 in total, to all service providers, which includes FCE and BCG,
3 but also many other service providers, 8.3 million in excess
4 fees in the years at issue.

5 We've pleaded in Count 1 of the Complaint that the
6 Plan paid excess expenses for all service providers. That's
7 where that number comes from. His methodology for coming to
8 that number is set forth in the report. He does not need to do
9 a vendor-by-vendor analysis.

10 One of the cases that Defendants cite in their own
11 motion, the *Baltimore Aircoil Company, Inc.* case says that,
12 where an expert is providing a broad lost profits analysis, the
13 expert doesn't need to do a vendor-by-vendor analysis under --

14 **THE COURT:** That was Judge Blake's -- that was
15 Judge Blake's opinion about two years ago. Go ahead.

16 **MR. DALIN:** Yes.

17 **THE COURT:** Yes. I'm familiar with it.

18 **MR. DALIN:** It stands for the opposite of what Chimes
19 is arguing now.

20 The FCE number that they cite is -- they rely on
21 Table 12, which is the wrong table. We asked Naugle to just
22 provide an opinion of whether the stated rate in the adoption
23 agreements are reasonable based on the stated rate. That's
24 Table 12.

25 He calculated his damages, though, off of actual

1 expenses paid, which is Table 17. So the problem is we keep
2 coming back to this problem. There is stated expense rates in
3 the agreement, but we don't have any contemporaneous invoices
4 or records showing how they actually calculated the fees that
5 they actually charged. But we know the actual aggregate
6 amounts charged from the bank records that we subpoenaed and
7 records that we subpoenaed from third-party providers.

8 So Naugle used those numbers, the actual amounts
9 paid, to calculate his damages. That's Table 17. That's how
10 the Secretary gets to his number of 3.6 million of direct
11 compensation paid to FCE. That's the amount based on the
12 actual expense paid. That's the right table.

13 **THE COURT:** All right. Well, I think that this is
14 the kind of thing that will have to await the trial of the case
15 in terms of this analysis, but I'm going to essentially deny
16 the Defendants' motion at this point in time for the following
17 reason: That, with respect to the overall calculation of 8.3
18 million and the gap between that figure and the amount of
19 compensation paid to FCE specifically, I think that it
20 appropriately lists any excessive expenses paid by all service
21 providers, but not limited to FCE.

22 And I think that, as I recall, there is another case
23 that I had -- I'm drawing a blank on the name of it -- that I
24 think you all cited somewhere as well, where I was consistent,
25 a year later from Judge Blake's opinion. I think it was

1 *Mathias* -- the *Mathias* case, if I recall.

2 And so, for those reasons, essentially the
3 Defendants' joint motion to preclude the Secretary from
4 offering evidence of any claim in excess of 2.9 will be denied.
5 Paper Number 483 will be denied.

6 All right. Now, where we are now is that we still
7 have FCE Defendants' motions, and there are three or four of
8 those, as I recall, and then we have -- actually, it's more
9 than four, I think. Then we have the Chimes
10 Defendants' motions.

11 I don't want anyone to get off the line here, but I
12 would like, just out of courtesy for the court reporter for a
13 minute, we can just take a little bit of a break. We're going
14 to take about five minutes. You'll have a live mic open over
15 there, and we'll just take no more than a five-minute break
16 here, so we'll get started. I'll be back on the line here in
17 about five minutes. Everybody stand by. Don't hang up the
18 telephone. Everybody stay on the line, and no more than five
19 minutes. We'll take a five-minute break.

20 Everybody good with that?

21 **MR. KOONIN:** Thank you, Your Honor.

22 **THE COURT:** Okay. We'll take a five-minute break,
23 but --

24 **MR. KOONIN:** Yes, Your Honor.

25 **THE COURT:** -- everyone keep the lines hooked up

1 here. Okay. Thank you.

2 (Recess taken, 5:23 p.m. - 5:29 p.m.)

3 **THE COURT:** Okay. We're back on the line here where
4 the court reporter is back. Mr. Giordano needed to take a
5 break, and we're ready to roll here.

6 I did hear on the phone that one of the counsel for
7 Ms. Ward had left the call. Rebecca Strandberg is no longer on
8 the line. Is there somebody still on the line for
9 Marilyn Ward, because I know I have a motion to deal with for
10 her in a few minutes here. Who is still on the line for --

11 **MR. WEATHERFORD:** Yes, Your Honor. Scott Weatherford
12 is still on the line. I'm not sure why Rebecca dropped. Maybe
13 she had another meeting, but I'll be on the line.

14 **THE COURT:** That's fine. You're still on Texas time,
15 so you're still --

16 (Whereupon, Ms. Strandberg entered the call.)

17 **THE COURT:** All right. Now she's back again.
18 Ms. Strandberg, I wasn't sure if you were still here or not.

19 **MS. STRANDBERG:** I'm sorry.

20 **THE COURT:** That's all right.

21 **MS. STRANDBERG:** I'm sorry. I accidentally hit the
22 button, so I had to call back in.

23 **THE COURT:** That's quite all right. That's quite all
24 right. Better to hit the button and go off than hit a live
25 button and not know you're on it, so that's fine.

1 (Laughter.)

2 **THE COURT:** It's been fatal to many people on more
3 than one occasion.

4 Okay. Here we go. Let me just go over, if we can,
5 in terms of the FCE Defendants' motion, plowing through these,
6 the few others that I've got to get to, just give me a second
7 here, but the FCE Defendants' motion *in limine* number one,
8 which is Paper Number 464, essentially the motion is to exclude
9 evidence and argument in support of what the Defendants
10 consider to be a new fiduciary theory that the Defendants
11 contend was not in the operative Complaint.

12 The Secretary has responded that it's within the
13 ambit of Rule 8 and was appropriately pled.

14 I'd be glad to hear from the Defense counsel on this
15 first.

16 **MR. KOONIN:** Yes, Your Honor. This is Marc Koonin.

17 So, first of all, this theory was not pleaded in the
18 Complaint or the Amended Complaint, and it was introduced for
19 the first time at oral argument on the motion for summary
20 judgment, and Your Honor may recall that I objected to it at
21 that time.

22 Now, Rule 8, the liberal pleading rule under Rule 8,
23 assuming it applies, which we don't think it does here, but
24 let's assume that it did.

25 **THE COURT:** Why would it not -- excuse me. Why would

1 it not apply?

2 **MR. KOONIN:** Well, Rule 8 applies, but, when you
3 specifically plead theories on specific fiduciary theory and
4 you leave out the one theory that you tried to introduce a
5 month and a half before trial, and you say, oh, it was hidden
6 in the Complaint all the time, I don't think that that is what
7 the case law supports. But, even more to the point, the
8 liberal pleading standard of Rule 8 is predicated on getting
9 information in discovery.

10 The Secretary never disclosed this theory in
11 discovery. We served discovery asking for a description of the
12 facts and the theories behind alleged fiduciary breaches, and
13 alleged prohibited transactions, and I went back and I looked
14 at the responses. The words "investment" and "investment
15 advisor" are not in those responses, Your Honor. This is pure
16 sandbagging, and it's unfair to do this now at this point in
17 the litigation.

18 It's a gotcha moment. It was expressly left out of
19 the theory of fiduciary responsibility by its absence in the
20 allegations about why FCE is allegedly a fiduciary, and it was
21 not identified in discovery.

22 And, in all fairness, Your Honor, Your Honor has
23 ruled that Ms. Thames' deposition can't come in and the expert
24 can't rely on it because that would be unfair to the Secretary
25 because of the timing. How is this fair? How is it right that

1 something that's not identified in the pleadings, not
2 identified in the motions, and not identified in discovery can
3 now be introduced now? That's not fair.

4 **THE COURT:** All right. I'd be glad to hear from the
5 Secretary on this.

6 **MR. DALIN:** Yes, Your Honor.

7 The Secretary pleaded in the Complaint and also
8 stated in discovery responses that FCE was a fiduciary by way
9 of recommending, negotiating, and executing the Plan's
10 agreements with service providers. Under the definition of
11 "fiduciary," that satisfies all three subparagraphs. The
12 Secretary doesn't need to say the word "investment advisor" in
13 its discovery responses. We provided the facts by which our
14 theory rests that FCE is a fiduciary.

15 We raised this argument in summary judgment in
16 connection with the prohibited transaction exemption contained
17 in the regulation 29 CFR § 2550.408, which cites an illustrated
18 example wherein an investment advisor recommends purchase of an
19 insurance policy, and it's a prohibited transaction because the
20 investment advisor collects a commission in connection with
21 that transaction.

22 That's directly applicable to what FCE did here. The
23 important part of that example isn't that the party is
24 necessarily an investment advisor; it's that they're a
25 fiduciary. In that example, they're a fiduciary by way of

1 being an investment advisor. FCE is a fiduciary with regards
2 to these transactions under all three subparagraphs of the
3 definition of a "fiduciary." They exercised discretionary
4 control of Plan assets. They recommended to the Plan what
5 contracts to enter into, which is recommending to the Plan how
6 to spend its money. And they also had discretionary control
7 over administration of the Plan.

8 Those facts were set forth in the Complaint, had been
9 set forth throughout discovery. The Secretary isn't required
10 under the notice pleading standard to say magic words or
11 reference every subparagraph of every provision that may be
12 implicated in connection with the facts pleaded in the
13 Complaint.

14 **THE COURT:** All right. Well, the simple fact of the
15 matter is I'm going to deny this motion at this point in time,
16 and the Secretary may present evidence which it feels relates
17 essentially to the matter of investment advice, but I will tell
18 you that, while I'm denying the motion, I don't intend to give
19 that a whole lot of weight, and, at the trial of this case,
20 this is really not what the trial of this case is about in
21 terms of investment advice.

22 So I'll permit the Secretary to introduce it, and I
23 will deny the motion, but, at the bench trial, I don't view
24 this case -- in terms of the breach of fiduciary duties and my
25 knowledge of the facts of this case, I don't see this as being

1 an investment advice case, just to let you know that that's my
2 view of the evidence, and it remains to be seen, but that's my
3 view of it.

4 But I'll deny the motion, and I'll permit the
5 Secretary to introduce evidence with respect to a fiduciary
6 theory. I think that it is sufficiently within the ambit of
7 Rule 8 and *Twombly* and *Iqbal* and all the other cases, but I
8 don't anticipate it being granted -- I mean, I don't anticipate
9 there being a great deal of weight accorded to that, quite
10 frankly, as long as the Secretary understands that.

11 So, with that, the next motion of the Defendants',
12 motion *in limine* of the FCE Defendants, is to exclude testimony
13 of Diane Lapin and what it contends is an inadmissible e-mail
14 chain, and this has to do with essentially Ms. Lapin being an
15 informant whose name was initially withheld by the Government
16 under the Government informants privilege, and the FCE contends
17 it has been prejudiced and deprived of deposing her to provide
18 a defense.

19 And, with that, I'll be glad to hear from Defense
20 counsel, and then I'll hear from the Secretary.

21 **MR. KOONIN:** Thank you, Your Honor. This is
22 Marc Koonin again.

23 There is two parts to this, and I'd like to address
24 them separately. So one part has to do with the e-mails that
25 contains an e-mail chain from a third party that alleges that

1 FCE says something that -- that FCE allegedly did, is allegedly
2 unethical, and we objected to this when the Secretary produced
3 its declaration for the first time. I flagged for the
4 Secretary that Ms. Lapin cannot authenticate a communication
5 from somebody else and that a version of that e-mail has been
6 produced three times in the record that did not have that
7 surplusage, and we gave them an opportunity to switch it out,
8 and they didn't do that, okay?

9 Whatever else Your Honor rules about Ms. Lapin and
10 whatever else she can authenticate, she cannot authenticate an
11 e-mail chain on which she was not copied, okay? And it's clear
12 that that chain is in there solely to cast aspersion on our
13 client, particularly when we've already pointed out to the
14 Secretary that versions in the communication that Ms. Lapin
15 alone was copied on exists and that they could switch that out,
16 but they declined to do that. So that's the first issue.

17 The second issue is: One of the Secretary's key
18 arguments for why it was okay not to disclose Ms. Lapin
19 previously and not to give us an opportunity to explore issues
20 related to Ms. Lapin is that she was supposedly -- there was a
21 concern that she could be retaliated against because FCE sent
22 letters to its employees reminding them that they had to honor
23 their nondisclosure agreements with regard to HIPAA and trade
24 secrets.

25 Your Honor may recall -- it's been some time, but

1 this argument was already rejected by this Court back when the
2 Secretary sought to have a protective order regarding the
3 Donna Zapata issue. They specifically cited this as a theory
4 that employees were being intimidated in their motion, which
5 was ECF 165, and Your Honor allowed me to participate by phone,
6 and I very much remember that Your Honor told them that that
7 letter was a standard business letter, there was nothing out of
8 the ordinary about it, and Your Honor denied their motion at
9 ECF 187.

10 So the whole basis of this supposedly keeping
11 Diane Lapin as a secret witness is the theory that she got a
12 vanilla, bland business letter telling her not to disclose
13 HIPAA information and trade secrets that Your Honor has already
14 told the Secretary was okay back -- I want to say -- I think
15 that was in early 2017.

16 So they had Your Honor's ruling on that for over a
17 year, but they apparently nevertheless use that as an excuse to
18 hide her until now.

19 **THE COURT:** All right. Well, thank you very much.

20 I'd be glad to hear from the Secretary on this.

21 **MR. DALIN:** Yes, Your Honor.

22 Former employees get retaliated against. We enforce
23 20-something retaliation statutes here at the Department of
24 Labor. We get these cases all the time where former employees
25 get blackballed in the industry or in the local market by the

1 former employer because they spoke or the employer believed
2 that they spoke to the Government, so we take that very
3 seriously. We assert the privilege.

4 Here, it doesn't matter. We produced these e-mails
5 to Defendants in February of 2017. The e-mails aren't
6 redacted. Diane Lapin's name is on them. We didn't withhold
7 her name from the evidence itself. We stated in our initial
8 discovery responses in, I believe, February of 2017 that there
9 is an informant who can testify that FCE solicited donations
10 from other service providers on behalf of the Chimes Plan.

11 The only thing that wasn't disclosed to FCE pursuant
12 to the Government's now informants privilege is that it was
13 Diane Lapin who could tell us that, and we have the right to
14 assert that privilege out of, you know, fear of retaliation,
15 and, you know, FCE's argument here is really a motion to compel
16 argument. They had that motion to compel. You know, they
17 didn't pursue it any further.

18 She can't be excluded when the Secretary has properly
19 raised the privilege, having the Secretary signing a
20 declaration asserting the privilege, and we disclosed all the
21 underlying information to Defendants two years ago.

22 **THE COURT:** As I understand it, the discovery in this
23 case did close in January of 2018, and the identity of
24 Ms. Lapin was not disclosed specifically until October 30th of
25 this year, 2018. Is that correct?

1 **MR. DALIN:** We asserted the informants privilege as
2 to her identity. We produced the e-mails, though, that have
3 her name on them.

4 **THE COURT:** That have --

5 **MR. KOONIN:** Your Honor?

6 **THE COURT:** My question to the Government: Is it
7 correct that the discovery closed at the end of January of this
8 year, say ten months ago, almost eleven months ago, and that
9 the identity of Ms. Lapin in terms of being the informant was
10 withheld until October 30th, 2018, when a declaration from her
11 was produced authenticating the e-mails which had been
12 previously referenced? Is that correct, or not?

13 **MR. DALIN:** Yes. We disclosed her as a trial witness
14 in October. We disclosed, in response to discovery, persons
15 who have knowledge of the facts except to the extent that we
16 had asserted the informants privilege over certain employees or
17 former employees.

18 **THE COURT:** All right. Well, with respect to that,
19 the basic principle of fairness has to apply here, and there is
20 absolutely no public interest in holding that until six weeks
21 ago. This is December the 17th.

22 **MR. DALIN:** Your Honor, there is ample case law that
23 says we can withhold names until ordered by the Court.

24 **THE COURT:** I've read the case law. Mr. Dalin --
25 Mr. Dalin, I'm well aware of your expertise in this area, and,

1 believe me, I've tried more than a few cases, and, with all due
2 respect to you, this is not just a narrow area of labor law,
3 okay? So you don't need to cite the cases to me with respect
4 to -- there is literally -- there is a Fourth Circuit case in
5 2018 that absolutely rejects your argument, so I don't want to
6 hear a lecture from you on labor law. This has nothing to do
7 with labor law. This has to do with trial lawyers trying
8 cases, and it's way too cute to come up on October 30th and say
9 on December 17th, "We notified them." You notified them six
10 weeks ago.

11 That does not cut it with this trial judge, period.
12 And there is loads of authority in that regard. So this motion
13 is granted. And, if I had any idea you were going to -- you do
14 that at your own peril, sir. You do it at your own peril.

15 And it has nothing to do -- this is basic trial law
16 in the federal court of the United States, and it's true in
17 criminal cases. It's true in civil cases. It's across the
18 board. It's well stated in a case that you may or may not be
19 familiar with under criminal law known as *Roviaro*. It's true
20 across the board, and so we're not going to get caught in the
21 weeds over what you think how it's defined under labor law.

22 I don't mean to be quip with you, but I don't think
23 that's fair, okay, and I've spent enough time in a courtroom.
24 When I see something that's fundamentally unfair on either
25 side, I'm going to call either side out on it, and that is way

1 too cute. So whoever made the decision for the Secretary to
2 disclose them on October 30, 2018, and then placed you in a
3 position of trying to defend it six weeks later, you cut it way
4 too close. So this motion is granted, and the testimony of
5 Diane Lapin will be excluded, and the e-mail chain will be
6 excluded for the reasons indicated on the record. So Paper
7 Number 465 is granted for the reasons set forth on the record.

8 All right. And we'll move along. I don't of any
9 grudge against the Secretary on this, Mr. Dalin. I'll keep my
10 mind open on each motion, but that one was way too cute, and
11 the Secretary's position is untenable as to that, and that
12 motion will be granted for those reasons.

13 All right. The third motion to address now is the
14 FCE Defendants' motion *in limine* number three to exclude
15 evidence relating to benefit plans other than the Chimes, and
16 that is Paper Number 3, and I'll be glad to hear from Defense
17 counsel on that.

18 **MR. KOONIN:** Yes, Your Honor. Marc Koonin again, and
19 I'm going to be addressing all of these for FCE.

20 I know that Your Honor has ruled that general
21 evidence of claims processing may be permitted, and so I'm not
22 going to reargue that motion, but that is not the only kind of
23 evidence relating to other plans that the Secretary has
24 indicated he may offer.

25 In particular, the Secretary has referenced several

1 documents having to do with a former FCE client, TRDI. That's
2 the initials of Training Rehabilitation Disability, Inc., I
3 believe, or, in any event, as the Secretary well knows, there
4 was a lot of very, very contested litigation in both state and
5 federal court simultaneously involving TRDI, and I was involved
6 in that litigation, and, in discovery, the Secretary attempted
7 to help our opponents by providing them with documents, and it
8 also came out in discovery that they had obtained documents
9 from the TRDI counsel.

10 And so they've listed, for example, a Plan document
11 for TRDI as one of their trial exhibits, and I know we haven't
12 gotten to it yet, but they list this privileged communication
13 relating to TRDI's in the trial exhibits -- as a trial exhibit,
14 and I don't know what else they have out there that's not
15 related to claims, but the bottom line is FCE administers at
16 any given time over a hundred plans, and, over the years, there
17 is turnover. So, for all I know, going back eight years, you
18 know, it could be 150, it could be 200.

19 But bringing in -- Your Honor has already ruled that
20 evidence related to other litigation is excluded. Evidence
21 that relates to totally different plans that have this
22 different benefits packages, different sizes, some are private
23 sector, some are public sector, or non-profit, I should say --
24 not public sector, but non-profit -- that's not relevant. It
25 will require a lot of time if we have to dig up what the

1 dispute was and address that at trial.

2 And the only reason that the Secretary says that this
3 is relevant is they say: Well, see, the documents here are
4 different. You've produced more express language about whether
5 FCE is a fiduciary. Well, unsurprisingly, FCE, like most
6 businesses, updates its records and forms from time to time.
7 The fact that it makes something more express or more clear as
8 it develops forms over time doesn't really have anything to do
9 with whether the prior form is sufficient to set forth its
10 status as a non-fiduciary.

11 **THE COURT:** I understand. I understand your
12 argument. I understand. I understand. And the documents
13 you're relating to, I think, is another motion. Is that the
14 Trial Exhibit 164, the attorney-client and work product
15 privilege e-mail chain? Is that to which you're referring to
16 as well?

17 **MR. KOONIN:** Yes.

18 **THE COURT:** All right. Then I understand. I got it.
19 I understand. I understand. All right. That's fine.

20 I'd be glad to hear from the Government.

21 **MR. KOONIN:** Wait. I don't want to beat a dead
22 horse, but it's not relevant. It's going to require a mini
23 trial, and I think the Secretary is, frankly, being a little
24 cute, because the Secretary has already gotten all of this, you
25 know, evidentiary discovery in other litigation from other

1 counsel.

2 **THE COURT:** I understand. I understand. We're
3 trying to -- it's getting late here. I'm trying -- I
4 understand. I'm trying to let you all --

5 **MR. KOONIN:** Okay. I'm sorry, Your Honor. I'm done.

6 **THE COURT:** We're not going to argue at length every
7 one, as I told you all before almost two hours ago. We're
8 trying to get through these.

9 All right. I'd be glad to hear from the Government
10 on this.

11 **MR. KOONIN:** All right. I'm finished, Your Honor.

12 **THE COURT:** It seems to me that this relates also to
13 the matter of, as I understand it, the work product issue with
14 respect to the e-mail chain and Mr. Crutcher with respect to a
15 dispute between FCE and Training and Rehabilitation, as I
16 recall as well, and this is woven together. The two of them
17 are woven together; is that not correct, Mr. Koonin?

18 **MR. KOONIN:** It's correct to a point, but there is a
19 couple of minor additional points with that one.

20 **THE COURT:** Don't worry about it. I don't need the
21 additional points. I've read it. I've read it.

22 **MR. SCHARLAT:** Yes, Your Honor.

23 **THE COURT:** Go ahead. The Government will respond
24 now on, first of all, the matter to exclude evidence relating
25 to benefit plans other than the Chimes Plan, and I think that

1 what is tied in with that is also this matter with respect to a
2 discovery issue with respect to disclosure of what the Defense
3 contends is attorney-client and work product privilege as to
4 another matter, but just go ahead, Mr. Dalin -- I'd be glad to
5 hear from you -- or Ms. Liu, whoever is going to address this.

6 **MR. DALIN:** It's Mr. Dalin, Your Honor. Just to be
7 clear, do you want me to address the e-mail issue in this
8 argument, or --

9 **THE COURT:** No, no. Just quickly address this in
10 terms of the matter of essentially the Defendants' motion *in*
11 *limine* to exclude evidence relating to benefit plans other than
12 the Chimes Plan. I've essentially already addressed this
13 issue; have I not? We're not going to have mini trials here.

14 **MR. KOONIN:** I think you have, Your Honor.

15 **MR. DALIN:** There is a little bit of difference from
16 the earlier motion, but, first, we need to address FCE's
17 allegations that the Secretary was sharing information with
18 TRDI in their case. That didn't happen. There is a provision
19 of the Act where a plan can request records from the Department
20 of Labor with regards to its plan -- the plan's representative
21 can request. So they may have filed a request for information
22 that the Government is required by law to respond to, so maybe
23 that's how they got some documents.

24 The document that Mr. Koonin references, which is the
25 adoption agreement for the TRDI plan, is in the public record

1 in that lawsuit, and I believe FCE even filed it. We just got
2 it from public records. And we're not going to be putting into
3 evidence any allegations from that case, any results of that
4 case.

5 **THE COURT:** Well, let's go to the parent one. Let's
6 go to the big picture. Before we get to the document issue,
7 which may be moot dependent on how I rule on this issue,
8 address the matter of evidence being presented with respect to
9 benefit plans other than the Chimes Plan.

10 **MR. DALIN:** So, to interpret a contract, a party can
11 put in evidence of another contract that the party has in order
12 to glean the meaning of the terms when comparing the two, so
13 the adoption agreement in the TRDI case is an FCE adoption
14 agreement. It looks very much the same as the Chimes adoption
15 agreement, but some terms are different.

16 So FCE is arguing in this case that certain
17 provisions remove discretion from it in this case; it wasn't
18 acting with discretion per the terms of the Plan. But you can
19 see in the TRDI adoption agreement, which they drafted, that
20 they use different language when trying to remove itself from
21 having discretionary authority, more direct language in TRDI,
22 which Courts can look at in reaching a conclusion about the
23 meaning of the terms --

24 **THE COURT:** I understand. I understand your
25 argument. The bottom line on this is -- the bottom line on

1 this is in terms of a presiding judge in a bench trial here,
2 Mr. Dalin, it may or may not have any relevance under Rules 401
3 or 402, but, as far as I'm concerned, it goes afield of
4 Rule 403 with respect to essentially, one, if it's prejudicial;
5 two, if it's confusing. I don't intend to have mini trials on
6 other plans in this case. So Defendants' motion *in limine* to
7 exclude evidence relating to benefit plans other than the
8 Chimes Plan will be granted for the reasons set forth on the
9 record here. Paper Number 466 will be granted.

10 So, with that, it seems to me that the matter of the
11 Trial Exhibit 164 and the matter of the Training,
12 Rehabilitation & Development Institute contract is moot in that
13 there is no basis to introduce that exhibit in the first place
14 based upon my other ruling, it would seem to me, and, if you
15 want to take one more bite at the apple on this one, Mr. Dalin,
16 you go right ahead.

17 **MR. DALIN:** Yeah.

18 **THE COURT:** What would be the purpose of my having
19 this exhibit coming in?

20 **MR. DALIN:** So David Crutcher, one of the attorneys
21 for FCE, has put into the record two declarations purporting to
22 recalculate the fees that FCE charged to the Chimes Plan. TRDI
23 is another plan serviced by FCE. They have the same trustee.
24 They both -- TMS is the trustee for both. The e-mail discusses
25 that TMS couldn't recalculate the fees for the Plan. This

1 works in conjunction with the earlier letter from Crutcher,
2 where he says: We can't recalculate the fees charged to the
3 Plan.

4 This is rebuttal evidence for Crutcher's latest
5 declarations where he says he can calculate the charges, and
6 Grace Dong's declaration, which we discussed earlier, where she
7 says she can calculate the charges, when, earlier on, the same
8 trustee, under the same system with FCE, said that they
9 couldn't recalculate the charges.

10 **THE COURT:** I understand your argument, and it's
11 going to be denied for the same reason. I'll be capable of
12 interpreting that, and I'll make rulings in terms of
13 credibility, in terms of your cross-examination of
14 Mr. Crutcher, but we're not going to go afield. I'm not going
15 to have mini trials here in terms of other disputes in other
16 matters with the Secretary. It's going to be tough enough to
17 try to get this case tried in a reasonable period of time
18 without going afield and having mini trials.

19 So this is probably the third time now I've ruled in
20 the same fashion on the same essential issue. We're not going
21 to go far afield on this case. So that will be granted as well
22 for the reasons set forth on the record.

23 So I think the next motion that we have here -- the
24 next motion that we have is essentially -- I think we've got a
25 total of -- according to my notes, I've got a total of five

1 more motions to get through here according to my notes, and
2 this is the motion *in limine* of the FCE Defendants to exclude
3 testimony of David Levin for lack of personal knowledge, and
4 essentially the FCE Defendants have moved to exclude his
5 deposition designations because they're not based on personal
6 knowledge. He's a former FCE employee, and the Secretary has
7 responded that the designations from his deposition are related
8 to matters that he participated in and observed.

9 And, from that, I'll be glad to hear from the FCE
10 Defendants briefly, because, to put it bluntly, I'm hard
11 pressed to understand how a former employee of the FCE would
12 not have certain knowledge about certain matters; that he's
13 certainly free, as far as I'm concerned, to testify as to those
14 matters in which he participated or as to which he observed in
15 terms of just basic evidentiary principles. It doesn't mean
16 he's binding FCE in any way in terms of areas outside of his
17 prior employment, but whether he's employed for a year and a
18 half or three months, it's relevant in terms of what he
19 observed as far as I'm concerned.

20 So I'd be glad to hear from FCE Defense counsel on
21 this.

22 **MR. KOONIN:** Yeah. Your Honor is correct that what
23 Mr. Levin actually observed would be relevant to the extent
24 that he had a foundation. The problem is, if you look at the
25 cited testimony, he testifies as to the meaning of things. So,

1 for instance, he sees an e-mail, and the e-mail says, "Adjust
2 the employee count," and then he goes ahead and testifies that
3 he thinks that that's improper and someone made it up, but he
4 also testified he doesn't work with the sales team and interact
5 with the clients, so he doesn't know whether the client told
6 them to do that or not.

7 He testifies that he thinks that the, quote/unquote,
8 make commissions high button means certain things, but when
9 he's asked about who designed it, no. Do you know how it was
10 used? No.

11 You know, so that's the problem. He observes certain
12 things, but he's not testifying strictly that I observed this
13 spreadsheet, or I got this e-mail. He is moving it out on
14 speculation two levels beyond saying here is what it means and
15 here is what this other person was thinking, even though he has
16 no foundation on any of that.

17 **THE COURT:** Well, that's going to go to the weight,
18 not the admissibility. As I understand it, he worked in the
19 actuary department; is that right?

20 **MR. KOONIN:** Yes, that's correct, Your Honor.

21 **THE COURT:** All right. And he was an underwriter; is
22 that correct?

23 **MR. KOONIN:** That's not quite correct. He was in
24 training in that department, but he wasn't -- I don't think you
25 could say that he was a fully-qualified --

1 **THE COURT:** Well, that depends -- you can challenge
2 his credibility on that. Mr. Koonin, you can challenge his
3 credibility on that, but, to the extent that he's an
4 underwriter and those duties include budgeting and plans and
5 what have you, and plan designs, he's certainly free to testify
6 as to that. He worked there for a period of time.

7 You can attack him in terms of exactly what he did or
8 did not work on and what his expertise was or his area. I'm
9 not going to qualify him as an expert, but there is no merit to
10 this motion *in limine* to exclude the testimony of Daniel Levin
11 for lack of personal knowledge. So the secretary doesn't even
12 need to respond on this. This motion, Paper Number 468, will
13 be denied for the reasons indicated here on the record.

14 So where we are now is we are at the motion *in*
15 *limine* -- FCE's motion *in limine* number six, I believe, of the
16 seven motions *in limine* by the FCE Defendants, and this motion
17 number six essentially is that the FCE Defendants have moved to
18 exclude any admissions by Co-Defendants against them because
19 Co-Defendants are obviously not bound by another Defendant's
20 admission.

21 The Secretary contends that this blanket exclusion is
22 somewhat overbroad and that it may or may not be admissible.
23 With respect to that, I'll hear from the Secretary first. What
24 is the theory here? Is there a conspiracy count in this case?
25 I don't believe there is, is there?

1 **MS. LIU:** Katrina Liu here.

2 No, Your Honor. We are not seeking to -- well, we
3 don't expect to use evidence of Chimes D.C.'s out-of-court
4 statements for the truth of the matter asserted under the
5 conspiracy non-hearsay definition. Our only argument is that
6 we understand we cannot use it as party opponent statements
7 against FCE, but we can use it for impeachment for -- I'm
8 sorry -- excuse me -- for impeachment purposes, not as to the
9 truth of the matter asserted.

10 And so, in that sense, we just want to ensure that --
11 we can still admit this evidence, the statements by Chimes
12 D.C., at least against Chimes D.C.

13 **THE COURT:** All right. I understand, Ms. Liu.
14 Ms. Liu, that is a noble effort worthy of a great law school
15 performance in a classroom. Trying to get around a clear rule
16 of evidence is not permitted, and I'm teasing you here a little
17 bit, but the skill with which you tried to dance around it is
18 illustrative of the point that the Defendants' motion number
19 six shall be granted, so any evidence of Co-Defendants'
20 admissions shall not be admissible in any way, in any context
21 against the FCE Defendants, and so that will be granted.

22 Okay. So I think that we have one more motion of the
23 FCE Defendants, and that is number seven here, and Paper
24 Number 7 of the FCE Defendants' motion *in limine* is to exclude
25 evidence and argument relating to Significa Benefit Services,

1 Inc. Essentially, there is a great deal of information
2 provided about Significa, which became essentially a
3 relationship later, as I understand it, with Chimes D.C.

4 Essentially, as I understand it, the FCE Defendants
5 argue that this kind of information was revealed late and not
6 until the Pretrial Order, that it will be prejudice -- the
7 Secretary's essentially said that Significa did not replace FCE
8 until January of 2018, so that the Secretary was only aware of
9 it then, and there is a question as to the admissibility of
10 evidence relating to Significa Benefit Services.

11 Let me save you all some time here from billable time
12 against your clients. I'm really not interested in Significa
13 Benefit Services, Inc. I'm trying to keep my focus upon the
14 allegations in this case, consistent with my other rulings,
15 and, in terms of solicitation for RFPs or what have you and
16 another third-party administrator, it's of limited utility to
17 me on either side, quite frankly, but it is the FCE Defendants'
18 motion *in limine* to exclude that evidence. I'll be glad to
19 hear from you, but I really think you can be very brief. I
20 need to hear from the Secretary on this, because I'm not
21 anxious to go afield on this. It's very important.

22 **MR. KOONIN:** Well, Your Honor, I'll --

23 **THE COURT:** This case is detailed enough. This case
24 is detailed enough. You don't need to be going afield on this.
25 Go ahead.

1 **MR. KOONIN:** No, Your Honor. Your Honor has already
2 granted ECF 473, which overlaps for different purposes, because
3 the alleged remedial measures --

4 **THE COURT:** Right.

5 **MR. KOONIN:** -- were to bring in Significa, and so
6 granting this motion is consistent.

7 I will say one other thing and only one other thing
8 on this motion. Part of the Secretary's newly-disclosed theory
9 is that Significa should have been considered as some sort of a
10 comparator back in 2009.

11 We asked an interrogatory that was specifically and
12 expressly exactly on point, and the Secretary did not identify
13 Significa -- never did. And they raised this theory. They've
14 submitted these Internet page printouts just within the last, I
15 think, month and a half. I want to say it was in late October.

16 But the point is: For the same reason that Your
17 Honor did not allow remedial measures after 2017, Your Honor
18 should also not allow them to say: Oh, and they can come in
19 back in 2009. We asked the specific interrogatory on that.
20 They didn't provide it, and now, after the fact, they want to
21 bring in evidence, and Your Honor has already excluded the
22 evidence of the replacement process.

23 So I think Your Honor should grant this motion as
24 well.

25 **THE COURT:** All right. Government counsel, do you

1 want to respond on this?

2 **MR. DALIN:** Yes. This isn't a subsequent remedial
3 measure issue, nor does the Government want to put in evidence
4 from the request for proposal process. FCE's and
5 Defendants' expert, Aaron Raddock, argues -- and the parties
6 argues this as well -- that there are only two competitors to
7 FCE in the market to whom they could have looked for -- to
8 replace FCE's services. Well, here is another service provider
9 who can come into court and tell you that they could provide
10 the services as well to rebut the arguments from these -- from
11 Defendants and from the expert.

12 As to the discovery issue, at the time that FCE
13 issued the interrogatory asking us to identify other providers,
14 I mean, first, it should be noted that it's not our duty to
15 identify the providers; it's the fiduciary's duty. But, at
16 that time, we didn't know about Significa.

17 When we learned about Significa, we sent them a
18 subpoena. We noticed FCE of the subpoena. They got a copy of
19 the subpoena. And, when we got the documents, we turned them
20 over to FCE and other Defendants, so, once we learned about it,
21 we supplemented our discovery with the subpoena and provided
22 all documents that we received.

23 We're not looking to get into subsequent remedial
24 measures here. It's rebuttal of Defendants' contention that
25 there were no other players in the market who they could have

1 looked to besides the two that they identified, Boon and Fringe
2 Benefit Group.

3 **THE COURT:** All right.

4 **MR. KOONIN:** Your Honor, that's a switch of bait.
5 That's a switch of bait. The question here is: Who was
6 available in 2009? And there is no -- if Your Honor does not
7 grant this motion *in limine*, then we will have to put on
8 evidence of what Significa could or could not have done in
9 2009, which is not something we were allowed to do discovery on
10 before, and it's unfair to do it now, and they never amended
11 their interrogatory. It's true they've made a subpoena, but
12 that's different saying, well, Significa could do something in
13 2018. It's different than saying it could have done it nine
14 years before. That is a total switch of bait.

15 **THE COURT:** Well, the bottom line on it is this:
16 This scenario, somewhere in your materials here, if I recall,
17 there is a citation to a case that I had called *First Data*,
18 which was affirmed by the Fourth Circuit on many, many issues,
19 and this came up, I think, in discovery before the trial of the
20 *First Data* case, et cetera, et cetera, and I forget what -- you
21 could just try to find the *First Data* case somewhere. And I
22 was affirmed by the Fourth Circuit in that case.

23 First of all, there is a delay here in providing this
24 information, and it's prejudice to the other side. And, to the
25 extent that they could have found out about Significa and also

1 in terms of the time reference, I'm going to grant this motion.
2 I think it is akin to the remedial motion matter, but,
3 furthermore, apart from that, that there is improper delay with
4 respect to the length of time before this was necessarily
5 disclosed in a Pretrial Order.

6 So I've dealt with this before. I've been affirmed
7 by it before by the Fourth Circuit, and the Defendants' motion
8 is granted, excluding that evidence and argument related to
9 Significa Benefit Services. Paper Number 470 is granted for
10 the reasons set forth on the record.

11 So I think I just have two motions left.
12 Essentially, I have the motion of the Chimes Defendants. A
13 motion *in limine* to prevent the Secretary from offering
14 evidence of payments made by the Plan to reimburse Chimes D.C.,
15 Inc., for work performed by Chimes D.C., Inc. employee
16 Karen Holcomb is before me. And then I have the Defendant
17 Marilyn Ward's motion *in limine* to preclude certain evidence,
18 and so the Chimes Defendants counsel is up on deck here
19 finally, so I'd be glad to hear from you.

20 **MR. SCHARLAT:** Thank you, Your Honor.

21 Richard Scharlat.

22 Our point is very simple. The Secretary chose to
23 seek certain relief with regard to these payments, and that was
24 disgorgement under 502(a)(5). These payments are -- this
25 transfer of money was not of profit. It was a reimbursement

1 for services rendered. There was no overage. There was no
2 profit. There was simply a return of money from the Plan for
3 benefits it received to Chimes D.C.

4 The case that the Secretary cites, the *Leckey* case,
5 not comparable at all. That's where a trustee took \$500,000,
6 cleared out a trust, and put it in a different trust, and that
7 money was gone. That is not what happened here. It's not a
8 semantic argument. It's a very real argument under ERISA,
9 because there is no way for this to be a profit. It can't be
10 disgorged.

11 **THE COURT:** Does it not also weave into my matter of
12 a limitations issue, as I recall, on Holcomb as well?

13 **MR. SCHARLAT:** This is -- yes, Your Honor. This has
14 been reduced. It's been almost cut in half -- actually, I
15 think cut in half.

16 **THE COURT:** Right.

17 **MR. SCHARLAT:** It's down to about \$233,000. That's
18 correct.

19 **THE COURT:** All right. I'd be glad to hear from the
20 Secretary on this.

21 **MS. LIU:** Yes, Your Honor. Katrina Liu.

22 How to characterize whether it's a reimbursement or
23 profit or a payment, it is a transaction that Chimes D.C.
24 caused the Plan to make that the Secretary alleges is self
25 dealing. And so, whether it was for direct expenses, that's

1 something for the Defendants to carry the burden on, and so the
2 characterization of simply reimbursement doesn't negate the
3 substance of the transaction, which is a prohibited transaction
4 under ERISA 406.

5 And so, for that reason, we oppose the motion to
6 exclude.

7 **THE COURT:** All right. This motion will be granted.
8 I've looked at this at some length before, but I'm reviewing it
9 here now in terms of the matter of reimbursement -- the issue
10 here as to the employee Karen Holcomb. Essentially, the
11 Secretary of Labor has limited its remedy to disgorgement and
12 essentially is seeking to compel a payment of a sum of money
13 here, which should be barred, because the matter of trying to
14 include this as reimbursement, I think, is not consistent with
15 the other rulings I've already made.

16 First of all, I know that I cut this thing in half in
17 terms of the matter of anything having to do with payments
18 before January 1 of 2010, as I recall, and this, I think,
19 relates to the matter of Holcomb payments.

20 The Order that I issued back in November, just a few
21 weeks ago, granting the Defendants' joint motion for summary
22 judgment, I noted, as I recall there, that the Secretary had
23 actual knowledge of these facts well before the Chimes signed
24 the tolling agreement here. And so, as a result of that,
25 essentially the defense here essentially were reimbursements

1 and not just unjust profits, consistent with my earlier ruling,
2 so, to sort of dance around and trying to say that that
3 characterization is not important, there is not going to be an
4 issue before me that it was a prohibited transaction resulting
5 in losses to the Plan, and, quite frankly, in light of the
6 amount of money involved compared to what's being sought in
7 this case, it's of very little moment to me.

8 So, with that, the Defendants' motion *in limine*,
9 Paper Number 482, shall be granted for the reasons indicated on
10 the record. So that will be granted.

11 So then I think we have one more motion here, to my
12 knowledge, and that is coming on past a little two hours now.
13 We're getting a lot of work done. I certainly appreciate the
14 people who are on the East Coast time here, particularly the
15 court reporter.

16 The last remaining motion that I have here is the
17 motion of the Defendant Marilyn Ward, motion *in limine* to
18 preclude evidence relating to Ward's recordkeeping after her
19 retirement, and, essentially, as I understand it, looking at
20 these arguments and the submissions of the parties of the Paper
21 Number 474 and the response of the Secretary, which is Paper
22 Number 509, essentially Ms. Ward has requested that this Court
23 exclude all documents and testimony and other evidence relating
24 to her recordkeeping after her retirement, and contends that it
25 is not relevant in that I've already ruled that she is not

1 liable for anything after December 13, 2013, her effective
2 retirement date, and it is essentially not relevant whether she
3 currently possesses any records related to the Plan, and she
4 essentially has argued that it's inappropriate for the
5 Secretary to argue that her failure to keep records should
6 result in a presumption against her that she failed to maintain
7 records.

8 The Secretary's response has been that anything that
9 happened to the records after she retired is relevant, and
10 apparently there is some contention that she felt the records
11 were in FCE's possession, and essentially the Secretary wants
12 to elicit testimony about whether the documents existed and who
13 retained them.

14 I guess the real question here is the matter of her
15 recordkeeping after her retirement. I've already ruled that
16 she is not liable for anything after December 13, 2013, and to
17 the extent that there is some suggestion that she had an
18 obligation to review records is really what's at issue here.

19 So I'll be glad to hear from counsel for Ms. Ward,
20 and then I'll hear from the Secretary, counsel.

21 **MR. WEATHERFORD:** Thank you, Your Honor. This is
22 Scott Weatherford, and I'll be short. I think you summarized
23 it pretty well.

24 The only thing I'll add is that that's exactly the
25 point of this *limine*, is the fact that, in light of Your

1 Honor's ruling limiting her fiduciary responsibility post
2 December 13, 2013, any intent by the Secretary to use
3 Ms. Ward's recordkeeping practices after that date to somehow
4 imply that she didn't keep proper or adequate records during
5 the time that she did serve as trustee is simply not probative
6 of any fact that's at issue in the remaining claims against
7 Ms. Ward.

8 **THE COURT:** All right. Counsel for the Secretary,
9 Ms. Liu or Mr. Dalin?

10 **MS. LIU:** Yes.

11 **THE COURT:** Ms. Liu?

12 **MS. LIU:** Yes. Katrina Liu here.

13 The Secretary's concern is Ms. Ward's recordkeeping
14 during the time -- before she retired, the period of time
15 during which she could be held liable. What the Secretary is
16 seeking, though, is what happened to those documents in order
17 to, I guess, see or to present evidence on what Ms. Ward's
18 recordkeeping practices were during her trusteeship.

19 The Secretary hasn't been able to get those records,
20 and there has been some back and forth between FCE and Ward
21 about what happened to those records or whether those records
22 even exist. And so, to the extent that the documents still
23 exist beyond Ms. Ward's retirement, the Secretary would like to
24 be able to at least question witnesses about what happened to
25 those documents in order to flesh out the Secretary's

1 allegation that Ms. Ward wasn't keeping track of FCE's fees
2 while she was trustee.

3 **THE COURT:** Well, I don't think that what -- in terms
4 of trying to hold her responsible, Ms. Liu, for records,
5 wherever the records are now in terms of her level of conduct,
6 I in no way would make a finding of fact that would in any way
7 advance the Secretary's position with respect to, if someone
8 doesn't know where records are now some five years after the
9 fact, that that would in any way reflect upon how she kept
10 records up to December 13, 2013.

11 You are certainly free to pursue from FCE in terms of
12 what records they do and don't have. I don't know that there
13 is a spoliation issue here or not. I don't know. But I see
14 nothing that requires, you know, inquiry of Ms. Ward with
15 respect to what she did after her retirement.

16 I mean, if someone from FCE says, "We gave all the
17 records to Ms. Ward," and, Ms. Ward can say, "No, you didn't.
18 I don't have the records." That may or may not be the evidence
19 and how it breaks at trial, but the matter of her recordkeeping
20 after her retirement is simply not in the case, and nor can it
21 be judged in terms of what she did or didn't do prior to
22 December 13th of 2013.

23 It doesn't mean you can't pursue or argue that FCE
24 did not keep appropriate records. In any kind of case like
25 this, you're free to do so. But it doesn't relate to trying to

1 present evidence against Ms. Ward with respect to that.

2 So, with respect to this motion, Paper Number 474,
3 the Defendant Marilyn Ward's motion *in limine* to preclude
4 evidence relating to her recordkeeping, that motion will be
5 granted for the reasons set forth on the record.

6 So I think that we have dealt with all the open
7 motions *in limine*. I have the schedule. The Order that I
8 issued last Friday has noted -- it was filed as a Letter Order,
9 but it was deemed to be a direct Order of Court, and the Clerk
10 has docketed it as such. We granted the request -- in light of
11 Mr. Eassa's health issue, we've delayed the case for about a
12 week so that the bench trial in this case will begin on Monday,
13 January the 14th. The pretrial conference will be Friday,
14 January the 11th. Parties are to exchange electronic copies of
15 trial exhibits by Friday, January the 4th. And the Pretrial
16 Order shall be to me by Thursday, January the 3rd. And we,
17 consistent with that Order, have held a on-the-record telephone
18 conference to address the current pending motions *in limine*, so
19 I think we're ready to roll here on this.

20 It will remain to be seen. We'll go over how
21 starting the case a week later will impact the overall
22 schedule. I know that, for religious reasons, we've previously
23 noted -- hold on just one second.

24 (Pause.)

25 **THE COURT:** We have previously noted that we'll make

1 sure we stop at the appropriate time on a Friday during the
2 trial, and we haven't really had time to go through the days
3 that we're sitting in light of the fact that the case is
4 starting a week later. Obviously the case is not going to end
5 on the date we anticipated. I thought we were going to finish
6 by January 28th. We may not. We'll have to wait and see on
7 this.

8 Is there anything else from the point of view of the
9 attorneys for the Secretary of Labor, from the Government
10 counsel?

11 **MS. LIU:** No.

12 **MR. DALIN:** No, Your Honor.

13 **THE COURT:** Okay. Is there anything --

14 **MS. LIU:** No, Your Honor.

15 **THE COURT:** Is there anything else from the point of
16 view of the Chimes Defendants here?

17 **MR. SCHARLAT:** No, Your Honor.

18 **THE COURT:** All right. Is there anything else from
19 the FCE Defendants here?

20 **MR. KOONIN:** One minor point, Your Honor. Your
21 Honor --

22 **THE COURT:** Yes.

23 **MR. KOONIN:** -- since you granted motion *in limine*
24 number four about the privileged exhibit --

25 **THE COURT:** Yes.

1 **MR. KOONIN:** -- we'd like the Secretary to destroy
2 it.

3 **THE COURT:** That's fine. That was going to be Trial
4 Exhibit Number 164; is that correct?

5 **MR. KOONIN:** Yes. That's what it -- the numbers are
6 changing since we're meeting and conferring, but, regardless,
7 it's a privileged document, and Your Honor has excluded it.
8 They should destroy the document.

9 **THE COURT:** I agree. Any problem with that?
10 Government counsel, any problem?

11 **MR. DALIN:** Well, I think you ruled that it's
12 excluded for relevance reasons, but not that it was privileged.

13 **THE COURT:** Well, it is privileged. Destroy it.
14 That make it easier for you?

15 **MR. DALIN:** Sure, Your Honor. Thank you.

16 **THE COURT:** All right. Just destroy it. And, as an
17 Officer of the Court, I'll assume you've done that, and it will
18 be destroyed.

19 Anything else from the point of view of the FCE
20 Defendants?

21 **MR. EASSA:** Your Honor, this is Rob Eassa. I am
22 going to make an attempt to participate in the trial, and I
23 would like to take the Court up on its offer of accommodations
24 with respect to possible parking and use of a back-door
25 elevator to get in and out.

1 **THE COURT:** That's fine. We'll do whatever you want
2 to do in that regard. Just remind me. We'll make sure that
3 we -- I think the best way on this, there is handicapped
4 parking right at the front door of the courthouse, right on the
5 horseshoe driveway, and there is a ramp, disability accessible,
6 for court staff off to the right of the main door, and you can
7 roll in there, and you can roll right around to the elevator
8 and come right up to the fifth floor, my courtroom. And we'll
9 make sure that we can accommodate you with respect to bathroom
10 facilities.

11 I'm just thinking that, as to that, Mr. Eassa, the
12 men's room on the fifth floor is disabled accessible with a
13 larger toilet facility, for example, and a rail, but you still
14 could just roll out of the courtroom and go around the bend to
15 the bathroom, and that's all on one floor, and there are large
16 handrails there that would assist you. So I think that all
17 that can be done, and, as far as I'm concerned, yes, we'll make
18 sure you get a parking spot, and we'll have it for you there.
19 I'd be glad to do it.

20 **MR. EASSA:** Thank you, Your Honor.

21 **MR. KOONIN:** Your Honor, one last --

22 **THE COURT:** Yes. Go ahead.

23 **MR. KOONIN:** Your Honor, one last thing. This is
24 Marc Koonin. We have understood that Your Honor was going to
25 use the ceremonial courtroom on Floor 1.

1 **THE COURT:** No. We're not.

2 **MR. KOONIN:** I think Your Honor mentioned the fifth.

3 **THE COURT:** Yes.

4 **MR. KOONIN:** Okay. I just wanted to clarify that.

5 **THE COURT:** We're going to order -- yes. In light of
6 some of the parties who are no longer in the case, as far as
7 I'm concerned, you all have been in my courtroom, I think. You
8 all have been there. And I have a large Defense table with six
9 chairs, and then I have chairs behind it. And the Plaintiffs'
10 counsel's table has three chairs, so that we have space for
11 Government counsel, and we have space for Defense counsel for
12 essentially the three parties that we have here, so we have
13 room for two lawyers for each party, and we have chairs behind
14 that where people can sit.

15 We have a witness room where we can store exhibits,
16 so you all can keep exhibits in a certain room right there and
17 just keep lugging things back and forth. And the fifth floor
18 is much more accommodating than the ceremonial courtroom, and,
19 despite the grandeur of the ceremonial courtroom, most lawyers
20 agree that the acoustics in there are terrible, and so we're
21 not going to be -- we don't have any need now to use the
22 ceremonial courtroom, and my staff will follow up on that to
23 verify that we'll be trying this case in Courtroom 5D, my
24 courtroom. And, as I say, it's very easily accessible for you,
25 Mr. Eassa. It will be fine. It will be fine. Okay.

1 **MR. EASSA:** Thank you, Your Honor. I appreciate
2 that. On security, getting into the building, Your Honor,
3 security, I have a problem. I have an inability to take my
4 shoes off or really do that. I can't bend down.

5 **THE COURT:** I know. I understand.

6 **MR. EASSA:** Is that an issue?

7 **THE COURT:** We have started a security check on you
8 already, Mr. Eassa, and your colleagues of yours were not quite
9 as raucous as your high school years, and so I've made sure
10 that they delete some of those things, you know --

11 **MR. EASSA:** Thank you, Your Honor. I appreciate
12 that.

13 **THE COURT:** And certainly, consistent with everyone,
14 once people get to law school, they really start to behave, so
15 I have no bad reports from the FBI or the CIA on any of you all
16 in terms of your law school years, and some of you were a
17 little raucous in your college years, but that's another
18 matter.

19 **MR. EASSA:** Great. Great.

20 **THE COURT:** We don't need to worry about that. We'll
21 square that away. I'll talk to the security -- court security
22 personnel and the court security officers and the Marshals, and
23 that will be fine. We'll be able to roll you in and out pretty
24 easily, and it will be okay. It will be fine. Okay?

25 **MR. EASSA:** Great. Thank you, Your Honor.

1 **THE COURT:** All right. Good enough.

2 **MS. STRANDBERG:** Your Honor?

3 **THE COURT:** Yes? Yes?

4 **MS. STRANDBERG:** Your Honor?

5 **THE COURT:** Yes?

6 **MS. STRANDBERG:** I would like to thank you. This was
7 a massive amount of material. You've worked very hard, and, on
8 behalf of all of us, I'd like to say that we appreciate it.

9 **THE COURT:** Well, that's quite all right. That's my
10 job, and I'm glad to do it. And, if I was quip with any of the
11 lawyers, I apologize, and I'm very sorry I couldn't accommodate
12 Mr. Eassa. I actually have enjoyed it. I like cases, and I
13 like being in the courtroom, and these are very interesting
14 issues. And I'm sorry. Who was just speaking? Who was the
15 very intelligent person who just spoke?

16 **MS. STRANDBERG:** Rebecca Strandberg.

17 **THE COURT:** All right. Rebecca Strandberg.

18 **MS. STRANDBERG:** Rebecca Strandberg.

19 **THE COURT:** Rebecca Strandberg. Obviously that's the
20 most intelligent thing that's been said thus far by all the
21 lawyers in the case.

22 (Laughter.)

23 **THE COURT:** We're all laughing here. That's the most
24 cogent, and I appreciate your great perception, Ms. Strandberg,
25 on that.

1 No. That's fine. I'm looking forward to the case,
2 and we're going to get this case tried, and it's been at issue
3 a long time, and the Government's entitled to get this case
4 tried, and so are the Defendants, so that's my goal, and we'll
5 work through this.

6 And I will tell you that I have -- I guess because of
7 the fact that I was fortunate enough to be able to try a lot of
8 cases, both civil and criminal, when I was at the bar before I
9 went on the bench, I really -- I can't guarantee it's going to
10 be two weeks, but it will definitely be three. I have never,
11 ever had a bench trial -- and I've had some complicated bench
12 trials over the years. I have never had a bench trial where I
13 didn't get an opinion out within 15 days.

14 So what I do is that I'm going to ask for proposed
15 findings of fact and conclusions of law from everyone at the
16 conclusion of the case. I'll warn you ahead of time that, as
17 we try the case, you start betting those ready. So, when we
18 complete the case, within a -- along with your closing
19 arguments, within a matter of two or three days, I will want
20 proposed findings of fact and conclusions of law. I take those
21 into account along with closing argument, and then I get to
22 work on it right away, and you'll notice that the law clerk
23 working on the case will be with me in the courtroom the entire
24 time.

25 So we keep our nose to the grindstone on a bench

1 trial. We don't let it drift. So I can promise you that. So
2 you'll have an opinion in this case and resolution from which
3 the parties can take -- either side can take an appeal
4 certainly by the second week in February. So that's where we
5 are. So good enough.

6 Well, anyway, you all have a wonderful holiday, and
7 try to enjoy the holiday in light of this pace we have here.

8 And, Mr. Eassa, I certainly hope that you continue to
9 heal, and I'm very sorry that you have to be going through this
10 right now, particularly during this time of year, so all the
11 best to all of you.

12 **MR. EASSA:** Thank you, Your Honor.

13 **THE COURT:** If anyone needs me for any reason, just
14 let me know. I'll be around next week as well, but just sort
15 of in and out a little bit, so I'll see you all in January.
16 Thank you very much. Take care. Bye-bye.

17 **MR. KOONIN:** Thank you, Your Honor.

18 **MR. SCHARLAT:** Thank you, Your Honor.

19 **MS. LIU:** Thank you, Your Honor.

20 **THE COURT:** Bye-bye.

21 (Proceedings adjourned.)
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1 CERTIFICATE OF OFFICIAL REPORTER

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5 I, Martin J. Giordano, Registered Merit Reporter and
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